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No. 88-805-AFX
Status: GRANTED

Title: Ohio, Appellant
v.
Akron Center for Reproductive Health, et al.

Docketed:
November 10, 1988

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for appellant: Eppler,Rita S.

Counsel for appellee: Evans,Roger K., Lohr,Ann-Louise

Entry	Date	Note	Proceedings and Orders
1	Nov 10 1988	G	Statement as to jurisdiction filed.
2	Nov 10 1988		Appendix of appellant Ohio filed.
4	Nov 25 1988		Order extending time to file response to jurisdictional statement until January 13, 1989.
5	Jan 13 1989		Brief amici curiae of Nevada, et al. filed.
7	Jan 13 1989		Motion of appellees Akron Center for Reproductive Health, et al. to affirm filed.
6	Jan 18 1989		DISTRIBUTED. February 17, 1989
8	Jan 21 1989	X	Reply brief of appellant Ohio filed.
9	Jun 23 1989		REDISTRIBUTED. June 29, 1989.
10	Jul 3 1989		PROBABLE JURISDICTION NOTED.
			**********
12	Jul 11 1989		Order extending time to file brief of appellant on the merits until August 28, 1989.
40	Aug 3 1989		Brief amicus curiae of American Family Association filed.
15	Aug 16 1989	D	Motion of Alan Ernest for leave to represent children unborn and born alive filed.
16	Aug 16 1989	D	Motion of Legal Defense for Unborn Children for leave to file a brief as amicus curiae filed.
14	Aug 18 1989		Brief amici curiae of Save America's Youth, Inc., et al. filed.
29	Aug 26 1989	D	Motion of James Joseph Lynch, Jr. for leave to file a brief as amicus curiae filed.
17	Aug 28 1989		Brief amicus curiae of United States Catholic Conference filed. VIDED.
18	Aug 28 1989		Brief amicus curiae of Knights of Columbus filed. VIDED.
19	Aug 28 1989		Brief amicus curiae of Association of American Physicians and Surgeons filed.
20	Aug 28 1989		Brief amici curiae of Focus on the Family and Family Research Council, et al. filed.
21	Aug 28 1989		Brief amicus curiae of Concerned Women for America filed.
22	Aug 28 1989		Brief amici curiae of Jerome S. Luebbers, et al. filed.
23	Aug 28 1989		Joint appendix filed.
24	Aug 28 1989		Brief of appellant Ohio filed.
25	Aug 30 1989		Record filed.
		*	Certified copy of C.A. Proceedings and briefs received.
27	Sep 1 1989		Order extending time to file brief of appellee on the merits until October 14, 1989.
28	Sep 1 1989		Brief amici curiae of American Psychological Assn., et al. filed. VIDED.
30	Sep 6 1989		Record filed.
		*	Certified copy of original record on appeal, box,

No. 88-805-AFX

Entry	Date	Note	Proceedings and Orders
			received.
31	Sep 7 1989		Brief amici curiae of Anti-Defamation League of B'Nai B'Rith, et al. filed. VIDED.
35	Sep 26 1989		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 29, 1989. (1ST CASE)
32	Oct 2 1989		Motion of Alan Ernest for leave to represent children unborn and born alive DENIED.
33	Oct 2 1989		Motion of Legal Defense for Unborn Children for leave to file a brief as amicus curiae DENIED.
34	Oct 2 1989		Motion of James Joseph Lynch, Jr. for leave to file a brief as amicus curiae DENIED.
37	Oct 13 1989		Brief amici curiae of American College of Obstetricians and Gynecologists, et al. filed. VIDED.
38	Oct 13 1989		Brief amicus curiae of 13 Individual Members of the Panel on Adolescent Pregnancy filed. VIDED.
36	Oct 14 1989		Brief of appellees Akron Center for Reproductive Health, et al. filed.
39	Oct 14 1989		Brief amicus curiae of 274 Organizations in Support of Roe v. Wade filed. VIDED.
42	Oct 14 1989	X	Brief amici curiae of American Indian Health Care Assn., et al. filed.
41	Oct 17 1989		CIRCULATED.
43	Oct 30 1989	X	Reply brief of appellant Ohio filed.
44	Nov 29 1989		ARGUED.

JURISDICTIONAL

STATEMENT

88-805

Supreme Court, U.S.
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CASE NO.

In The Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, et al.,

Appellees.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a judicial bypass procedure, which is a component of a parental consent statute regulating a minor's right to an abortion, is a constitutionally required component for a parental notification statute.

2. Whether the Ohio parental notification statute, which contains a judicial bypass procedure, provides a constitutionally sufficient framework for ensuring the due process rights of a minor seeking an abortion.

3. Whether Ohio can constitutionally require a physician to provide notification to a parent or other individual authorized to receive notice, of an unemancipated, immature minor's intent to obtain an abortion; and, if not, whether the physician notification requirement should be severed to preserve the integrity of the statute and allow enforcement without the offending provision.

PARTIES

The Appellant in this action is the State of Ohio which intervened in this case pursuant to 28 U.S.C. §2403(b). In the Sixth Circuit, an appeal was filed by Summit County Prosecutor Lynn Slaby, who subsequently withdrew from the case.

The Appellees are Akron Center For Reproductive Health, Dr. Max Pierre Gaujean, and Rachel Roe.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION OF THIS COURT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

THE QUESTIONS PRESENTED ARE SUBSTANTIAL ... 12

A. THE ISSUE OF WHETHER THE *BELLOTTI II* BYPASS PROCEDURE IS CONSTITUTIONALLY MANDATED IN A PARENTAL NOTIFICATION STATUTE, AS HELD BY THE SIXTH CIRCUIT, HAS NOT BEEN DIRECTLY DECIDED BY THIS COURT AND WARRANTS REVIEW 17

B. THE SIXTH CIRCUIT'S FINDING THAT THE OHIO BYPASS PROCEDURE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WARRANTS FURTHER REVIEW BY THIS COURT BECAUSE THE DECISION AS IT PERTAINS TO CONFIDENTIALITY AND EXPEDITION IS IN CONFLICT WITH HOLDINGS OF THIS COURT AND OTHER LOWER COURTS; MOREOVER, OTHER CHARACTERISTICS OF OHIO'S BYPASS PROCEDURE PRESENTED UNIQUE QUESTIONS OF FIRST IMPRESSION WHICH WERE IMPROPERLY ANALYZED BELOW 19

1. Confidentiality and Expedition 20

2. Pleadings, Burden of Proof, and Constructive Authorization 23

C. THE SIXTH CIRCUIT'S DECISION FINDING OHIO'S PHYSICIAN NOTIFICATION PROVISION UNDULY BURDENSOME FAILS TO PROVIDE PROPER DEFERENCE TO OHIO'S INTEREST IN PROTECTING THE SAFETY AND WELFARE OF ITS MINOR CITIZENS AND IS INCONSISTENT WITH THE GUIDANCE PROVIDED BY THIS COURT 26

CONCLUSION 28

APPENDIX (Separately bound)

TABLE OF AUTHORITIES

CASES **PAGE**

Akron v. Akron Center for Reproductive Health,
462 U.S. 416 (1983) 17, 18, 26, 27, 28

Akron Center for Reproductive Health v. Rosen,
633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd,*
854 F.2d 852 (6th Cir. 1988) 9, 11, 12, 24, 26

Akron Center for Reproductive Health v. Slaby,
854 F. 2d 852 (6th Cir. 1988) ..... passim

American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283
(3rd Cir. 1984) *aff'd on other grounds*
476 U.S. 747 (1986) 21

American College of Obstetricians and Gynecologists v. Thornburgh, 656 F. Supp. 879
(E.D. Pa. 1987) 23

Bellotti v. Baird,
428 U.S. 132 (1976) 16

Bellotti v. Baird,
443 U.S. 662 (1979) 12, 16, 18, 19, 21, 22

Glick v. McKay,
616 F. Supp. 322, (D. Nev. 1985) 23, 25

Hartigan v. Zbaraz,
108 S.Ct. 479 (1987) 13, 17, 18

H. L. v. Matheson,
450 U.S. 398 (1981)..... 15, 16, 18, 27

Hodgson v. Minnesota,
827 F.2d 1191 (8th Cir. 1987)..... 18

PAGE

Hodgson v. Minnesota,
853 F.2d 1452 (8th Cir. 1988)
(*en banc*) 13, 15, 18, 21

Indiana Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127 (7th Cir. 1983)..... 17

Laird v. Tatum,
409 U.S. 824 (1972) 17

Margaret S. v. Treen,
597 F. Supp. 636 (E.D. La. 1984) 15, 21

Mathews v. Eldridge,
424 U.S. 319 (1976).....25

Planned Parenthood Ass'n v. Ashcroft,
462 U.S. 476 (1983) ..... passim

Planned Parenthood Ass'n of Atlanta v. Harris,
670 F. Supp. 971 (N.D. Ga. 1987) 21, 23

Roe v. Wade,
410 U.S. 113 (1973) 16

Thornburgh v. American College of Obstetrics and Gynecology,
476 U.S. 747 (1986) 18

Transworld Airlines, Inc. v. Hardison,
432 U.S. 63 (1977) 17

Zbaraz v. Hartigan,
763 F.2d 1532, (7th Cir. 1985) *aff'd mem.,*
108 S. Ct. 479 (1987)..... 17, 18, 21

CONSTITUTIONAL PROVISIONS AND STATUTES

PAGE

United States Constitution, Fourteenth Amendment ... 2

28 U.S.C. Section 1254(2) 2

28 U.S.C. Section 2103 2

28 U.S.C. Section 2403(b) ..... i, 10

Mo. Ann. Stat. §188.028(a)(1)(Vernon Supp. 1982) 20

Mo. Ann. Stat. §188.028(2)(1)(Vernon Supp. 1982) 20

Mo. Ann. Stat. §188.028.2(6)(Vernon Supp. 1982) 22

Ohio Rev. Code Ann. §149.43(A)(1) 5, 6, 20

Ohio Rev. Code Ann. §2151.28 11

Ohio Rev. Code Ann. §2151.421 ..... 11, 12

Ohio Rev. Code Ann. §2151.85 ..... 2, 3, 4, 10, 11, 12

Ohio Rev. Code Ann. §2151.85(A) 5, 11

Ohio Rev. Code Ann. §2151.85(B)(1) 5, 22, 24

Ohio Rev. Code Ann. §2151.85(B)(2) 5

Ohio Rev. Code Ann. §2151.85(C) 11

Ohio Rev. Code Ann. §2151.85(C)(1) 6, 24

Ohio Rev. Code Ann. §2151.85(C)(2) 6, 24

Ohio Rev. Code Ann. §2151.85(C)(3) 6, 24

Ohio Rev. Code Ann. §2151.85(D) 5, 20

PAGE

Ohio Rev. Code Ann. §2151.85(E) 6

Ohio Rev. Code Ann. §2151.85(F) 5, 20

Ohio Rev. Code Ann. §2151.85(G) 5

Ohio Rev. Code Ann. §2151.85(H) 2, 6, 10, 11

Ohio Rev. Code Ann. §2505.073 ..... 6, 22, 23, 24

Ohio Rev. Code Ann. §2505.073(A) 6, 20

Ohio Rev. Code Ann. §2505.073(B) 2, 3, 10

Ohio Rev. Code Ann. §2919.12 ..... 4, 26

Ohio Rev. Code Ann. §2919.12(B) 3

Ohio Rev. Code Ann. §2919.12(B)(1)(a) 3, 10, 12

Ohio Rev. Code Ann. §2919.12(B)(1)(a)(i) 3

Ohio Rev. Code Ann. §2919.12(B)(1)(a)(ii) 4

Ohio Rev. Code Ann. §2919.12(B)(1)(a)(iii) 4

Ohio Rev. Code Ann. §2919.12(B)(1)(b)(i) 3

Ohio Rev. Code Ann. §2919.12(B)(1)(b)(ii) 3

Ohio Rev. Code Ann. §2919.12(B)(1)(b)(iii) 3

Ohio Rev. Code Ann. §2919.12(B)(1)(c) 3

Ohio Rev. Code Ann. §2919.12(B)(2) 4, 10

Ohio Rev. Code Ann. §2919.12(B)(3) 4

Ohio Rev. Code Ann. §2919.12(C)(1) 4, 7

Ohio Rev. Code Ann. §2919.12(C)(2) 4, 7

Ohio Rev. Code Ann. §2919.12(D) 7

Ohio Rev. Code Ann. §4731.22(B)(19) 7

CASE NO.

In The Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, et al.,

Appellees.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, issued on August 12, 1988, is set forth in the Appendix (A-2) and is reported at 854 F.2d 852. The decision of the United States District Court for the Northern District of Ohio, Eastern Division, is also set forth in the Appendix (A-61) and is reported at 633 F. Supp. 1123.

JURISDICTION OF THIS COURT

This is an appeal from a judgment of the United States Court of Appeals for the Sixth Circuit entered on August 12, 1988, holding Ohio Amended Substitute House Bill 319 (" H.B. 319 ") unconstitutional. This action was initiated by Appellees in the district court by filing a complaint pursuant to 42 U.S.C. Section 1983 seeking declaratory and injunctive relief. The Notice of Appeal was filed with the Sixth Circuit

Court of Appeals on October 24, 1988, within 90 days of entry of the court of appeals' judgment. This appeal is taken, and jurisdiction conferred upon this Court, under 28 U.S.C. Section 1254(2).

If the Court determines that an appeal is not proper in this case, Appellant respectfully requests that this Jurisdictional Statement be considered as a petition for certiorari pursuant to 28 U.S.C Section 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

Ohio Amended Substitute House Bill 319 is appended to the opinion of the Sixth Circuit Court of Appeals (A-35).

STATEMENT OF THE CASE

THE STATUTE

The Ohio legislature on November 20, 1985, passed Amended Substitute House Bill No. 319 ("H.B. 319"). H.B. 319's major provisions are contained in Ohio Rev. Code Ann. §§2151.85, 2919.12 and 2505.073 (Page Supp. 1985) ("§2151.85", "§2919.12"and "§2505.073"). Ohio Rev. Code Ann. §2919.12 is a criminal statute that imposes parental notification obligations upon individuals who perform or induce abortions. Ohio Rev. Code Ann. §2151.85 is an entirely new statute. It provides a judicial procedure to bypass the obligations delineated in Ohio Rev. Code Ann. §2919.12. Ohio Rev. Code Ann. §2505.073, an equally new statute, creates an appellate process to be utilized by an unemancipated, pregnant minor who is unsuccessful in her

attempt under Ohio Rev. Code Ann. §2151.85 to bypass the parental notification requirements of Ohio Rev. Code Ann. §2919.12.

A. Notification

Ohio Rev. Code Ann. §2919.12 prohibits any person from knowingly performing or inducing an abortion upon an unmarried, unemancipated, pregnant minor without supplying notice to one of several persons in a variety of ways. Ohio Rev. Code Ann. §2919.12(B)(1)(a).

The physician must notify one of the minor's parents, or her guardian or custodian. Ohio Rev. Code Ann. §2919.12(B)(1)(a)(i). Such notice must be actual, accomplished either in person or over the telephone, and it must occur at least twenty-four (24) hours prior to the performance or inducement of the abortion. *Id.* In lieu of notice to one of the minor's parents, or her guardian or custodian, the physician may notify a sibling of the minor who is at least twenty-one (21) years old, or a designated stepparent or grandparent of the minor. *Id.* To effectuate this alternative to notification of the minor's parents, guardian or custodian, the minor must supply the identity of the prospective recipient of the notification to the physician with clarity, naming the recipient, specifying the nature of the relationship, and if the recipient is a sibling, identifying his or her age. Ohio Rev. Code Ann. §2919.12(B)(1)(b)(i). The minor must execute and file in a juvenile court an affidavit averring that, because of a pattern of parental or custodial abuse, she is in fear of same. Ohio Rev. Code Ann. §2919.12(B)(1)(b)(ii). The minor must also supply to the juvenile court the name and address of the physician, *id.*, as well as an affidavit from the prospective recipient. Ohio Rev. Code Ann. §2919.12(B)(1)(b)(iii). When the affidavits are filed, the juvenile court must notify the physician promptly, and if possible by telephone or in person. Ohio Rev. Code Ann. §2919.12(B)(1)(c).

Where notice in person or via the telephone to the parent, guardian or custodian cannot be supplied despite a

reasonable effort to do so, the statute provides for forty-eight (48) hour constructive notice. Ohio Rev. Code Ann. §2919.12(B)(2). The statute requires written notice to be mailed by both ordinary and certified mail to the last known address of either the parent/guardian/custodian or the specifically designated sibling/stepparent/grandparent. *Id.* The forty-eight (48) hour period runs from the time of mailing. *Id.*

If one of the minor's parents, the guardian, or the custodian consents in writing to an abortion, then neither notification nor any waiting period is required. Ohio Rev. Code Ann. §2919.12(B)(1)(a)(ii). Similarly, if a juvenile court authorizes the minor to consent without parental notification, neither notification nor a waiting period is needed. Ohio Rev. Code Ann. §2919.12(B)(1)(a)(iii). Furthermore, notification and a waiting period are not required if a medical emergency intervenes. Ohio Rev. Code Ann. §2919.12(C)(2). And finally, the waiting period is waived if the recipient of the notification "clearly and unequivocally" indicates no desire to consult with the minor. Ohio Rev. Code Ann. §2919.12(B)(3).

Should the physician, in fact, perform or induce an abortion upon an unmarried, unemancipated minor without notifying either one of her parents, guardian, or custodian, or an appropriate sibling, stepparent, or grandparent, Ohio Rev. Code Ann. §2919.12(C)(1) confers upon the physician an affirmative defense. No liability will result when a physician who, despite good faith, is misled by the minor about her age, marital status, emancipation, the age of her sibling, or the last known address of either of her parents, guardian, custodian or designated sibling, stepparent or grandparent.

B. Judicial Bypass

In addition to the procedure in Ohio Rev. Code Ann. §2919.12(B) providing for an alternative to direct parental or custodial notification, H.B. 319 creates another option to parental notification. Ohio Rev. Code Ann. §2151.85 provides that an unmarried, unemancipated minor wishing to abort without parental or custodial notification may file a complaint,

under oath, in the juvenile court of her county of residence, an adjacent county, or the county wherein the abortion facility is located, seeking court waiver of the notification requirement. Ohio Rev. Code Ann. §2151.85(A).

The complainant must allege that she is pregnant, unmarried, unemancipated, and under 18 years of age. *Id.* She must further allege that she wishes to have the abortion performed without notification to her parents, guardian or custodian. *Id.* Finally, the complainant must allege that either she is mature and well enough informed to intelligently decide whether to abort without such notification, or that notification would not be in her best interest because of abuse or some other reason, or both. *Id.*

At the earliest possible time, but in no event later than five business days, the court must hear the complaint on the record, without referring it to a referee. Ohio Rev. Code Ann. §2151.85(B)(1). Immediately after hearing the court must enter judgment. *Id.* If no judgment is entered within five business days of the filing of the complaint, a constructive order authorizing the minor to consent to the abortion without notification is deemed to have been entered. *Id.*

A guardian ad litem and an attorney must be appointed to represent the minor at the hearing. Ohio Rev. Code Ann. §2151.85(B)(2). The parents, guardian, or custodian of the minor are precluded from attending or even knowing of the proceeding. Ohio Rev. Code Ann. §2151.85(D). The record of the hearing is confidential and is not a public record under Ohio law. Ohio Rev. Code Ann. §§2151.85(F) and 149.43(A)(1) (Page Supp. 1985) ("149.43(A)(1)"). No fees or costs are charged to the minor. Ohio Rev. Code Ann. §2151.85(H). Forms prescribed by the Clerk of the Ohio Supreme Court are to be provided for use in instituting both the action in the juvenile court and any subsequent appeal to the court of appeals. Ohio Rev. Code Ann. §2151.85(G).

If the minor claims that she is mature and well enough informed to make an intelligent abortion decision or that notification would not be in her best interest, then the court

will consider the claim that has been plead. Ohio Rev. Code Ann. §2151.85(C)(1),and(C)(2). If she, her attorney or guardian ad litem produce clear and convincing evidence of her maturity or best interest, the court will issue an order authorizing an abortion without notifying her parents, guardian or custodian. *Id.* If no such evidence is produced, the court will dismiss the complaint, and immediately inform the minor of her right to appeal under Ohio Rev. Code Ann. §2505.073. Ohio Rev. Code Ann. §§2151.85(C)(1), (C)(2) and 2151.85(E).

If the minor claims both maturity and that notification would not be in her best interest, the court will not consider the latter unless and until it dismisses the former. Ohio Rev. Code Ann. §2151.85(C)(3). If the minor establishes her maturity by clear and convincing evidence, an order will issue in her favor. If she fails in that regard, the court will then decide whether notification would not be in her best interests. Should the court be clearly convinced that notification would not be in her best interest, it will issue an order in the minor's favor. Otherwise, it will dismiss the entire complaint and immediately apprise the minor of her appellate rights. *Id.*, and Ohio Rev. Code Ann. §2151.85(E).

C. Appeal

An expedited, confidential appeal process is set forth in Ohio Rev. Code Ann. §2505.073. As in the juvenile court, no fees or costs are assessed against the minor. Ohio Rev. Code Ann. §2505.073(A). Similarly, the record proceedings are confidential, and not a matter of public record. Ohio Rev. Code Ann. §§2505.073(B), 149.43(A)(1).

While no appointed counsel is mandated by the statute, the court of appeals is directed to liberally modify or dispense with the formal requirements that ordinarily apply to the appellant's brief. Ohio Rev. Code Ann. §2505.073(A).

The appeal must be docketed within four days of the filing of the notice of appeal. *Id.* The court of appeals must enter its judgment immediately after oral argument or, if it is waived,

within five days of the docketing date *Id.* If the court does not enter a judgment within five days of the docketing date, a constructive order in favor of the minor results. *Id.*

D. Penalties

A person who performs an abortion in violation of H.B. 319 is subject to criminal, civil, and administrative penalties. Specifically, a first time offender is guilty of a first-degree misdemeanor and all subsequent violations constitute a fourth-degree felony. Ohio Rev. Code Ann. §§2919.12(D). A minor's parents may institute a civil action against an offender for both compensatory and exemplary damages. Ohio Rev. Code Ann. §2919.12(E). Administratively, the physician would also be exposed to having his license to practice medicine limited, revoked, or suspended by the State Medical Board. Ohio Rev. Code Ann. §4731.22(B)(19) (Page Supp. 1985) ("§4731.(B)(19)"). However, an offender can assert the affirmative defense that the minor gave false information about her age, marital status or emancipation. Ohio Rev. Code Ann. §2919.12(C)(1). It is also an affirmative defense if the abortion was performed in an emergency to save the minor's life. Ohio Rev. Code Ann. §2919.12(C)(2).

PROCEDURAL HISTORY

On March 21, 1986, the Friday before H.B. 319 was to take effect, an Ohio corporate provider of abortion services, one of its physician-employees, and one of its patients commenced suit in the United States District Court for the Northern District of Ohio, Eastern Division, challenging the constitutionality of H.B. 319. The corporate provider of abortion services was the Akron Center for Reproductive Health ("Akron Center"). Max Pierre Gaujean, M.D., was the physician-employee of Akron Center, and Patty Poe (a pseudonym) was the patient. Named as Defendants in the complaint were Governor Richard F. Celeste, Ohio Attorney General Anthony J. Celebrezze, Jr., and Lynn Slaby, the Prosecuting Attorney for Summit County, Ohio. Plaintiffs sued all three Defendants in their official capacities only.

Additionally, they named Slaby as a representative of Ohio's eighty-eight (88) county prosecutors.

Akron Center claimed that H.B. 319 would adversely affect its interests by exposing its agents and/or employees to criminal or civil liability. Further, the Center claimed to represent classes of all unmarried, unemancipated, pregnant minors who were desirous of obtaining abortions. Included in those classes were: (1) pregnant minors who allegedly were mature and well enough informed to make a decision to abort, (2) pregnant minors who allegedly were immature, but in whose best interest parental notification would be unwarranted, (3) those minors who claimed to be burdened by H.B. 319's waiting periods; and (4) minors who simply did not care to disclose their sexual activity to either their parents or relatives, or to a court. Dr. Gaujean claimed to represent the same classes of women as did Akron Center. He further claimed that H.B. 319 threatened to cause him injury by interfering with his medical judgment and by exposing him to criminal, civil, and/or administrative penalties. Patty Poe claimed to be a mature and well enough informed minor, capable of making an informed abortion decision, who was, however, not sure whether she was pregnant. Poe claimed that she was damaged by H.B. 319 because, if she were pregnant, she would not wish to inform her parents or the juvenile court judge of any decision to abort. The act of notifying her parents or a judge, she claimed, would cause her emotional harm, humiliation, and embarrassment.

In addition to requesting a judgment declaring H.B. 319 to be unconstitutional, Akron Center, Gaujean and Poe sought to enjoin its enforcement. Toward that end, they filed motions for a temporary restraining order, and both preliminary and permanent injunctions. The motion for a temporary restraining order came before the district court on March 24, 1986. District Judge John M. Manos refused to grant the motion. As a result, H.B. 319 went into effect as scheduled on March 24, 1986.

The Plaintiffs amended their complaint and added two

parties. The new party plaintiff was Rachael Roe. Roe alleged that she was pregnant; that she was the mother of a two-year old child; and that she and her child lived with one of her parents. Roe further claimed that she wanted an abortion, but was refused one by the Akron Center. Alleging that she was mature and had been subjected to abuse at home, she expressed fear of approaching a court to seek a waiver of parental notice. The new party defendant was Gary M. Rosen, the Prosecutor for the City of Akron, Ohio. Like Slaby, Rosen was sued in both his official capacity and as representative of a class—all police prosecutors in Ohio.

On March 31, 1986, District Judge Ann Aldrich held an in-chambers hearing on Plaintiffs' motion for a temporary restraining order. At the conclusion of that hearing, the District Judge announced that she would restrain Defendants from enforcing H.B. 319 and issued a memorandum and order on April 1, 1986, granting the motion for a temporary restraining order for ten (10) days. This order was extended for an additional ten-day period until April 20, 1986.

Defendant Rosen moved for dismissal and argued that Defendant Celebrezze, not he, was responsible for enforcement of H.B. 319. Defendants Celeste and Celebrezze filed a motion to dismiss arguing that because neither of them had any connection with the enforcement of H.B. 319, the Eleventh Amendment barred the district court from exercising jurisdiction over the claims against them. Nevertheless, Governor Celeste and Attorney General Celebrezze addressed the merits of the constitutional issue. Plaintiffs filed responses to all three motions to dismiss and on April 21, 1986, the district court entertained oral arguments.

On April 22, 1986, the court issued a Memorandum and Order, *Akron Center for Reproductive Health v. Rosen,* 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd,* 854 F. 2d 852 (1988), in which it found Defendants Slaby and Rosen to be proper parties to bear the injunctive relief requested by the Plaintiffs, *id.* at 1129; that Patty Poe lacked standing, *id.* at 1128; that Defendants Celeste and Celebrezze did not possess the

necessary connection to the enforcement of the statute and therefore were dismissed pursuant to the Eleventh Amendment of the United States Constitution, *id.* at 1129-1130; and that the court viewed the filing of this action against the state officials as certification required by 28 U.S.C. §2403(b) and considered the Attorney General's participation in this litigation as that permitted under said statute, *id.* at 1130.

The district court did not find each of the Plaintiffs' attacks upon H.B. 319's constitutionality well-taken. It specifically rejected the argument that Ohio Rev. Code Ann. §2919.12 lacked the requirement of scienter or otherwise was unconstitutionally vague. *Id.* at 1133-34. It further rejected the argument that the twenty-four (24) and forty-eight (48) hour waiting periods set forth in Ohio Rev. Code Ann. §§2919.12(B)(1)(a)(i) and (B)(2) were arbitrary and inflexible. *Id.* at 1138-1139. The court also rejected Plaintiffs' claim that H.B. 319 contravened the Constitution by not providing for either appointed counsel on appeal or an appeal to the Ohio Supreme Court. *Id.* at 1139-1140. Finally, the District Court rejected Plaintiffs' argument that a minor seeking to use the waiver proceeding would be forced to forego her Fifth Amendment privilege against self-incrimination. *Id.* at 1141. Appellees, Akron Center, Dr. Gaujean and Roe, took no appeal from those portions of the judgment that upheld H.B. 319's constitutionality.

Although it found H.B. 319 constitutional in part, the district court found that the statute violated the Due Process Clause of the Fourteenth Amendment, concluding that the provisions could not be severed from the remaining portions of the statute, and enjoined the enforcement of the statute in its entirety. *Id.* at 1144-45.

In striking down H.B. 319 the district court found portions of the statute constitutionally defective. All but one of these provisions concern the judicial bypass procedures under Ohio Rev. Code Ann. §2151.85 and the appellate procedures under §2505.073 which the Court determined to be constitutionally mandated. *Id.* at 1133. The remaining issue

relates to the requirement of physician notification.

The district court first held the statute's constructive order provisions contained in Ohio Rev. Code Ann. §§2151.85 and 2505.073 were constitutionally inadequate because a physician will have no actual notification or tangible evidence that such constructive authorization has been given. 633 F. Supp. at 1134.

The district court next held that the clear and convincing evidence standard of proof that must be met by a minor seeking judicial waiver of the parental notification obligation is constitutionally impermissible. 663 F. Supp. at 1135. The court also found fault with §2151.85(C)'s pleading requirements that authorize the juvenile court to give consideration to both the minor's maturity and her best interests only if she files a complaint asking for consideration of both. The district court declared the pleading requirements constitutionally infirm. *Id.* at 1138. The district court found that the bypass procedures of both Ohio Rev. Code Ann. §§2151.85 and 2505.073 do not ensure that a final judicial determination will be made expeditiously. The entire judicial process, the court found, could last three weeks, and the court observed that the five day period given to the trial court seems unnecessarily long. *Id.* at 1141-43.

The final constitutional infirmity of the bypass procedure found by the district court was that H.B. 319 did not assure anonymity. The court based its conclusion upon four grounds. First, a minor who is not represented by an attorney must supply the clerk with her real name and an address where she can be reached. Second, Ohio Rev. Code Ann. §2151.85(A) limited venue to juvenile courts in the county of the minor's residence, any contiguous county, or the county wherein the abortion provider was located. Third, Rule 16, Ohio R. Juv. P., and Ohio Rev. Code Ann. §2151.28 (Page 1976), requires service of summons upon the parents of a minor who is before the juvenile court. Fourth, Ohio Rev. Code Ann. §2151.421 (Page Supp. 1985) requires attorneys, physicians and other professionals to confidentially report child abuse to a limited number of

governmental authorities. The Court found Juv. R. 16, and Ohio Rev. Code. Ann. §2151.421 in conflict with §2151.85 633 F. Supp. at 1144.

The remaining issue considered by the court was unrelated to the bypass procedure. The district court addressed H.B. 319's requirement that the physician accomplish notification, and declared the requirement constitutionally defective. The district court concluded that the physician notification provision, contained in Ohio Rev. Code Ann. §2919.12(B)(1)(a)(i), unduly burdens a minor woman's right to choose an abortion because it may add to the cost of abortion procedures. *Id.* at 1135.

The Sixth Circuit affirmed the lower court in all respects with the exception of the portion of the opinion related to the confidentiality provisions. The Sixth Circuit limited its finding regarding confidentiality to the infirmity in the petition form which they found defective because, while the petition form allowed the minor to proceed under a pseudonym, it still required her to sign her full name at the end of the petition and provide an address where the court can contact her throughout the bypass proceeding, unless represented by an attorney. 854 F.2d at 865. The Sixth Circuit rejected the balance of the district court's conclusions on confidentiality. *Id.* at 866. The Sixth Circuit affirmed the judgment of the district court enjoining the enforcement of H.B. 319. *Id.* at 861.

This action stems from the filing of the State of Ohio's notice of appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Pursuant to the judgment of the Sixth Circuit finding H.B. 319 to impose an undue burden on a minor's right to an abortion, this Court is presented with three questions of monumental import. First, is the judicial bypass procedure of *Bellotti v. Baird,* 443 U.S. 662 (1979) ("*Bellotti II*") required in a notification statute; second, assuming *Bellotti II*

standards apply in the notification context, does the Ohio statute, which has a bypass procedure in place, present an unwarranted governmental intrusion into a minor's decision on abortion; and third, is it an undue burden to require a physician to notify a parent, or other individual authorized to receive notice, of a minor's abortion decision. In sum, this court is called upon to address whether H.B. 319, read in its entirety, utilizes constitutionally adequate procedures for parental involvement in the abortion decision of a minor.

The Sixth Circuit ruled that the bypass procedure of *Bellotti II* is required in a statute providing for parental notification. Although this matter came before the 1985 Term of this Court in *Hartigan v. Zbaraz,* 108 S. Ct. 479 (1987), it was left unsettled with no opinion issued by an equally divided court. Consequently, this Court has yet to decide if a judicial bypass procedure is mandated when a state legislature enacts a parental notification statute seeking to further the legitimate state interest of protecting unmarried pregnant minors from the consequences of making the grave decision of whether or not to bear a child.

Moreover, the finding of the Sixth Circuit that H.B. 319 violated the *Bellotti II* consent standards and on its face imposed an unconstitutional burden on the right of an unemancipated minor to seek an abortion is in conflict with other circuit and district court holdings and is a matter warranting this Court's full attention. Most notably, in dramatic contrast with the decision of the Sixth Circuit in this case, the United States Court of Appeals for the Eighth Circuit, four days earlier in *Hodgson v. Minnesota,* 853 F.2d 1452, (8th Cir. 1988) (*en banc*), found constitutional a two-parent notification statute which is significantly more restrictive than the Ohio statute.

The substantial import of the issues presented in this case is further illustrated by the number of states which have unsuccessfully attempted to legislate in this area. Thirty-two (32) states have enacted statutes requiring some type of parental involvement in the decision of a minor to have an

abortion.[1] Fourteen (14) of those states have selected parental notification as the best means to protect the constitutional rights of the minor and the interests of the state.[2] With the release of decisions from the courts, state legislatures have amended their statutes to comply with court mandates.[3] Their

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[1] The following eighteen states require parental consent before a minor can obtain an abortion: Alabama, Ala. Code §26-21-3 (Supp. 1988); Alaska, Alaska Stat. §18.16.010 (1987); Arizona, Ariz. Rev. Stat. Ann. §36-2151 (Supp. 1987); Arkansas, Ark. Stat. Ann. §41-2555 (Supp. 1985); California, Cal. Health & Safety Code §25958 (Supp. 1988); Delaware, Del. Code Ann. tit. 13, §708 (1981); Florida, Fla. Stat. Ann. §390.001(4)(a) (West Supp. 1985); Indiana, Ind. Code Ann. §35-1-58.5-2.5 (Burns, Supp. 1988); Kentucky, Ky. Rev. Stat. §311.732 (1983); Massachusetts, Mass. Ann. Laws. Ch. 112 §125 (Michie/Law Co-op. 1985); Mississippi, Miss. Code Ann. §41-41-53 (1988); Missouri, Mo. Ann. Stat. §188.028 (Vernon, Supp. 1988); North Dakota, N.D. Cent. Code §14.02.1-03.1 (Supp. 1987); Oklahoma, Okla. Stat. Ann. tit. 63 §1-738 (West 1984); Pennsylvania, Pa. Cons. Stat. tit. 1 §3206 (Purdon 1983); Rhode Island, R.I. Gen. Laws §23-47-6 (1985); South Carolina, S.C. Code Ann. §44-41-30 (Law. Co-op. 1985); South Dakota, S.D. Codified Laws Ann. §34-23A-7 (1986); Washington, Wash. Rev. Code §9.02.070 (1985).

[2] The following fourteen states require parental notification in the event a minor chooses to have an abortion: Georgia, Ga. Code Ann. §24A-4401 (Supp. 1988); Idaho, Idaho Code §18-609(6) (1988); Illinois, Ill. Ann. Stat. Ch. 38, §81-64 (Smith-Hurd Supp. 1988); Louisiana, La. Rev. Stat. Ann. §40:1299.35.5 (West, Supp. 1988); Maine, Me. Rev. Stat. Ann. tit. 22 §1595 (1980 & Supp. 1988); Maryland, Md. Health-Gen. Code. Ann. §20-103 (1987); Minnesota, Minn. Stat. Ann. §144.343(3) (Supp. 1988); Montana, Mont. Code Ann. §50-20-105 (1987); Nebraska, Neb. Rev. Stat. §28-347 (1985); Nevada, Nev. Rev. Stat. §442.255 (1986 & Supp. 1988); Ohio, Ohio Rev. Code. Ann. §2919.12 (Page Supp. 1985); Tennessee, Tenn. Code Ann. §39-4-202 (1982); Utah, Utah Code Ann. §76-7-304 (1978); West Virginia, W. Va. Code §16-2F-3 (1985).

[3] *See e.g.*, Pennsylvania - 1974 Pa. Laws, Act No. 209 (ruled unconstitutional, *Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975), *summarily aff'd in part sub nom, Franklin v. Fitzgerald*, 428 U.S. 901 (1976) and *summarily vacated in part and remanded sub nom, Beal v. Franklin*, 428 U.S. 901 (1976), *modified on remand* (No. 74-2440) (E.D. Pa. 1977) *aff'd sub nom, Colautti v. Franklin*, 439 U.S. 379 (1979)). Pennsylvania attempted to enact abortion regulation legislation in 1978 by (2 1978 Pa. Laws, Act No. 16A (pp. 1506-1507) and 1 1978 Pa. Laws, Act No. 148) and in 1981 by amendment to another

efforts have been to no avail. Only five (5) states have statutes which the federal courts have found to be constitutional.[4] Fourteen (14) parental involvement statutes have been enjoined by court action.[5] Further, of the nineteen (19) statutes

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[3] *cont.*
unrelated bill. In 1982, the Pennsylvania Abortion Control Act, 1982 Pa. Laws, Act No. 138 was passed and codified as 18 Pa. Cons. Stat. §3201 *et. seq.* (1982). This Court held the 1982 act to be unconstitutional. (*Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). Pennsylvania amended its statute in 1988. (Act of March 25, 1988, No. 31 §§3-10, 1988 Pa. Legis. Serv. 173 (Purdon). The amended act is currently enjoined by court action. (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 686 F. Supp. 1089 (E.D. Pa. 1988)).

[4] Louisiana notice statute (*Margaret S. v. Treen*, 597 F. Supp. 636 (E.D. La. 1984)); Massachusetts consent statute (*Planned Parenthood League v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981)); Missouri consent statute (*Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983)), Minnesota notice statute (*Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*)); Utah notice statute (*H. L. v. Matheson*, 450 U.S. 398 (1981) (constitutional as it applied to "immature" minors.)).

[5] Arkansas (*Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980)); Florida (*Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 1981), and *Jacksonville Clergy Consultation Serv. v. Martinez*, No. 88-809-CIV-J-16, 1988 U.S. Dist. Lexis 11088 (M.D. Fla., October 6, 1988)); Georgia (*Planned Parenthood Ass'n of Atlanta Area, Inc. v. Harris*, 691 F. Supp. 1419 (N.D. Ga. 1988)); Illinois, (*Zbaraz v. Hartigan*, 108 S. Ct. 479 (1987)); Indiana (*Gary-Northwest Women's Serv. Inc. v. Bowen*, 421 F. Supp. 734 (N.D. Ind. 1976), *aff'd*, 429 U.S. 1067 (1977)); Kentucky (*Eubanks v. Collins*, 604 F. Supp. 141 (W.D. Ky. 1984)); Maine (*Women's Community Health Center v. Cohen*, 477 F. Supp. 542 (D. Me. 1979)); Mississippi (*Barnes v. Mississippi*, No. J86-0458W (stayed)); Nebraska (*Orr v. Knowles*, No. C.V.-81-0-301 1983 WL 1570 (D. Neb. Sept. 19, 1983)); Nevada (*Glick v. McKay*, 616 F. Supp. 322 (Nev. 1985)); Ohio (*Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988) (Akron II)); Pennsylvania (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 686 F. Supp. 1089 (E.D. Pa. 1988)); South Carolina (*Floyd v. Aders*, 440 F. Supp. 535 (D. S.C. 1977)); Tennessee (*Planned Parenthood of Nashville v. Alexander*, No. 79-843-II (Tenn. Chauncery Ct. Oct. 24, 1979)); Utah (*L. R. v. Hanson*, No. C80-0078 J (D. Utah Feb. 8, 1980) (Utah statute unconstitutional as it applies to mature emancipated minors)); and Washington (*State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975)).

currently in effect, thirteen (13) have yet to be challenged in federal court due to their recent enactment.[8] These results undermine the principle that states have a judicially recognized interest in regulating a minor's decision to have an abortion. *See H. L. v. Matheson,* 450 U.S. 398, 409-10 (1981); *Bellotti II,* 443 U.S. at 640.

The history of the courts' treatment of H.B. 319 could well be considered a paradigm of the inability of state legislatures to enact laws that effectuate the states' interest in encouraging parental involvement in the decision of a minor. Fifteen years after the ruling of *Roe v. Wade,* 410 U.S. 113 (1973) guaranteeing that the right to privacy encompasses a woman's right to decide whether to terminate her pregnancy, and more than a decade after the first ruling in *Bellotti v. Baird,* 428 U.S. 132 (1976) (*Bellotti I*) and *Bellotti v. Baird,* 443 U.S. 662 (1979) (*Bellotti II*), the Ohio legislature enacted parental notification legislation. The Ohio legislature drafted H.B. 319 cognizant of both *stare decisis* and the constitutional tension between legislative enactments pertaining to a woman's right to privacy and the unique status of minors under the law. The Ohio statute encompasses the legitimate state interests in promoting parental consultation with young women while recognizing the peculiar vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child-rearing. *See, Bellotti II,* 443 U.S. at 634. Despite the careful legislative drafting and attention to all prior precedents of this Court, the lower courts found H.B. 319 unconstitutional.

Legislation regulating abortion raises some of the most compelling and challenging legal and moral questions of our times. Clearly, the states need guidance to prepare statutes that protect minors without infringing on their right to have an abortion. The states have made laudable efforts

[8] These states are Arizona, Alabama, Alaska, Delaware, Idaho, North Dakota, Maryland, Montana, Oklahoma, South Dakota, Washington, and West Virginia. *See, supra* n.1 and 2 for statutory cites.

to comply with court orders, but no consistent guidelines are available on the standards to apply in analyzing the constitutionality of notice statutes. Accordingly, this Court should consider the constitutionality of parental notification procedures and provide guidance to ease this tension between legislative action and judicial decisions.

A. THE ISSUE OF WHETHER THE *BELLOTTI II* BYPASS PROCEDURE IS CONSTITUTIONALLY MANDATED IN A PARENTAL NOTIFICATION STATUTE, AS HELD BY THE SIXTH CIRCUIT, HAS NOT BEEN DIRECTLY DECIDED BY THIS COURT AND WARRANTS REVIEW.

The Seventh Circuit in *Zbaraz v. Hartigan,* 763 F.2d 1532 (7th Cir. 1985), *aff'd mem.,* 108 S. Ct. 479 (1987), relying on its earlier decision in *Indiana Planned Parenthood Affiliates Ass'n v. Pearson,* 716 F.2d 1127 (7th Cir. 1983), held that a parental notification statute could withstand constitutional scrutiny only if it provided a bypass procedure consistent with *Bellotti II,* 763 F.2d at 1539. The Seventh Circuit held this analysis was consistent with this Court's decision in *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983) ("*Akron I*"). *Zbaraz v. Hartigan,* 763 F.2d at 1539-44. An equally divided panel of this Court affirmed the *Hartigan* decision without opinion. *Hartigan v. Zbaraz,* 108 S.Ct. 479 (1987). In analyzing the application of *Hartigan v. Zbaraz* the Sixth Circuit found:

> This disposition leaves "the principle of law presented by the case ... unsettled." *Laird v. Tatum,* 409 U.S. 824, 838 (1972) (Memorandum of Rehnquist, J.); *see also Transworld Airlines, Inc. v. Hardison,* 432 U.S. 63, 73 n.8 (1977).

854 F.2d at 861.

Admittedly the Sixth, Seventh, and Eighth Circuits have found notification statutes require a bypass procedure similar

to *Bellotti II*. *See, Akron Center for Reproductive Health v. Slaby*, 854 F. 2d at 861 (6th Cir. 1988) ("*Akron II*"); *Zbaraz v. Hartigan*, 763 F.2d at 1539; and *Hodgson v. Minnesota*, 853 F.2d 1452, 1457 (8th Cir. 1988) (*en banc*).[7] However, this Court in the plurality opinion of *Bellotti II*, declined to equate notification requirements with consent requirements, finding "[n]either Danforth nor this case determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto." *Bellotti II*, 443 U.S. at 654 n. 1 (Stevens, J., concurring).

After *Bellotti II*, this Court issued numerous decisions with separately written concurring opinions interpreting the constitutionality of consent and notification statutes. *H. L. v. Matheson*, 450 U.S. 398 (1981) (Utah notification statute); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983) (Missouri consent statute); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (*Akron I*) (Ohio consent statute); *Thornburgh v. American College of Obstetrics and Gynecology*, 476 U.S. 747, (1986); (Penn. consent statute); *Hartigan v. Zbaraz*, 108 S. Ct. 479 (1987) (affirmed without opinion) (Ill. notification statute). However, this Court has not ruled in a majority opinion on whether the consent standards of *Bellotti II* apply to a notification statute.

Moreover, upon examination of the opinion in *H. L. v. Matheson*, 450 U.S. 398 (1981), the divergent viewpoints of the Court leave this matter unsettled. The majority opinion in *H. L. v. Matheson*, 450 U.S. 398 (1981) validated the Utah notification statute and recognized the difference between

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[7] The Eighth Circuit panel in *Hodgson v. Minnesota*, 827 F.2d 1191 (8th Cir. 1987), prior to rehearing interpreted *H. L. v. Matheson*, and found that ". . . though [it was] a majority opinion, [*Matheson*] technically never reached the question of whether it would be constitutional to apply a notice requirement to mature, emancipated, or 'non-best interest' minors. *Ashcroft*, *Akron*, and *Danforth* each dealt with a requirement that minors obtain parental consent; none dealt with a notification requirement." *Hodgson*, 827 F.2d, at 1196 n.3 (8th Cir. 1987).

notice and consent. *Id.* at 411, n.17. (Burger, C. J., majority). The concurring and dissenting opinions each expressed conflicting opinions. Justice Powell found "[a]lthough Bellotti II involved a statute requiring parental consent, the rationale of the plurality opinion with respect to this need is applicable here." *Id.* at 420 n.9. (Powell, J., concurring). Justice Stevens would have gone beyond the majority ruling and expressly declared the parental notification statute constitutional as it applied to all mature and emancipated minors. *Id.* at 425 and n.2. (Stevens, J., concurring). The dissent reached the opposite conclusion, finding notice to be the functional equivalent of parental consent. *Id.* at 437-41, n.27 (Marshall, J., dissenting). In *Akron I*, Justice Powell, writing for the six member majority, concluded that a state choosing to encourage parental involvement must provide a bypass procedure. 462 U.S. 416, 427 n.10.

Perhaps because of this divergence of opinion, Justice O'Connor opined that "no decision of this Court has yet held that parental notification in the case of mature minors is unconstitutional." 462 U.S. at 469 n.12. (O'Connor, J., dissenting). Consequently, an abundance of litigation attempting to resolve this issue has ensued. The need to resolve this issue is readily apparent. If a bypass procedure is not required in the context of a notification statute, then it will no longer be necessary for courts to review whether such statutes comply with the mandates of *Bellotti II*.

B. THE SIXTH CIRCUIT'S FINDING THAT THE OHIO BYPASS PROCEDURE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WARRANTS FURTHER REVIEW BY THIS COURT BECAUSE THE DECISION AS IT PERTAINS TO CONFIDENTIALITY AND EXPEDITION IS IN CONFLICT WITH HOLDINGS OF THIS COURT AND OTHER LOWER COURTS; MOREOVER, OTHER CHARACTERISTICS OF OHIO'S BYPASS PROCEDURE PRESENTED UNIQUE QUESTIONS OF FIRST IMPRESSION WHICH WERE IMPROPERLY ANALYZED BELOW.

1. Confidentiality and Expedition.

In accordance with the standards outlined in *Bellotti II*, H.B. 319 contains several provisions which mandate that the confidentiality of a minor who files a complaint be preserved. Ohio Rev. Code Ann. §§2151.85(D), 2151.85(F), 2507.073(B), and 149.43(A)(1). The Sixth Circuit found that H.B. 319 violated a minor's right to confidentiality because it requires her to sign her full name at the end of the petition and to provide an address where she can be reached unless she is represented by an attorney. *Akron II*, 854 F.2d at 865. However, this conclusion is plainly inconsistent with this Court's decision in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 416 (1983) ("*Ashcroft*").

In *Ashcroft*, the Court approved the confidentiality provisions of a Missouri statute which permitted a "next friend" of the minor to fill out her complaint for her and which allowed the minor to use her initials in the complaint's caption. *Ashcroft*, 462 U.S. at 491 n.16; Mo. Ann. Stat. §188.028(2)(1)(Vernon Supp 1982). The Missouri statute, however, still required the minor to sign the complaint in the event she did not have a "next friend" to fill it out for her and required the minor to provide the court with her parents' address. Mo. Ann. Stat. §188.028(a)(1)(Vernon Supp 1982).

Therefore, while H.B. 319 merely requires a minor to sign her name and leave an address where she can be contacted, the statute upheld in *Ashcroft* required the minor to divulge the address of her parents as well as to sign her name if no one would do it for her. It is inconceivable that H.B. 319 could be found to impose a more burdensome requirement than the Missouri statute. Moreover, the Sixth Circuit completely ignored the confidentiality assurances in H.B. 319 which go well beyond any provisions that were contained in the Missouri statute. *See* Ohio Rev. Code Ann. §§2151.85(D), 2151.85(F), 2505.073(B).

In addition to the need for correcting the Sixth Circuit's decision, further guidance on the issue of confidentiality is

needed to resolve the conflicting decisions of the lower courts. For instance, the Minnesota parental notification statute upheld in *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*) contains only general confidentiality statements. *Id.* at 1454, n.4., and 1462-63. In contrast, the Third Circuit in *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283 (3rd Cir. 1984), *aff'd on other grounds*, 476 U.S. 747 (1986), cautioned that in order to withstand constitutional scrutiny the bypass may not rely on generally stated principles of availability, confidentiality, and form. 737 F.2d at 297. The Seventh Circuit seems to have followed the earlier lead from the Third Circuit, when the court enjoined enforcement of a notification statute because the statute failed to contain any specific provisions to ensure a minor's anonymity. *Zbaraz v. Hartigan*, 763 F.2d at 1532, 1542-44, *aff'd mem.*, 108 S. Ct. 479 (1987).

Similar conflict pervades the way in which district courts have ruled on this issue. *See Margaret S. v. Treen*, 597 F. Supp. 636, 652-53 (E.D. La., 1984) (parental consent statute upheld with only a general statement assuring confidentiality); *Cf., Planned Parenthood Ass'n of Atlanta v. Harris*, 670 F. Supp. 971 (N.D. Ga. 1987) (parental notification statute allowing a minor to use initials on the petition but requiring signature, social security number and date of birth, found insufficient to preserve confidentiality). Thus, there is no question that the confidentiality requirement of *Bellotti II* warrants further scrutiny by this Court.

It is equally apparent that the Sixth Circuit's analysis on the issue of expedition must be subjected to further review. *Bellotti II* defined expedition as "sufficient expedition to provide an effective opportunity for an abortion to be obtained." 443 U.S. at 644. No decision of this Court has indicated a number of days that would mark compliance with the *Bellotti II* standards. Rather, the only benchmark comes from *Ashcroft* in which the Court approved a bypass procedure spanning approximately sixteen to seventeen days plus a reasonable period of time for the decision to be made at both the trial and appellate levels. 462 U.S. at 491 n.16; *see also*, Mo. Ann. Stat. §188.028.2(6) (Vernon Supp.

1982). Thus, as recognized by the Sixth Circuit, this Court in *Ashcroft* did not define the constitutionally permissible outer limits of a time frame that is sufficiently expedient under *Bellotti II*. *Akron II*, 854 F.2d at 867. No authority of this Court would suggest that adding a total of five days for decision making at the trial and appellate levels combined would violate the standards approved in *Ashcroft*.[8] Finding that the framework contained in H.B. 319 would span twenty-two days, the Sixth Circuit ruled that this length of time did not comply with the *Bellotti II* expedition requirement. *Akron II*, 854 F.2d at 868.

In concluding Ohio's bypass procedure at the outer limits would span a period of twenty-two days, the Sixth Circuit envisioned the worst possible scenario. By construing the statute in this manner, the court ignored its duty to interpret the statute in a manner that will avoid a danger of unconstitutionality. *Ashcroft*, 462 U.S. at 493. Accordingly, a more reasonable interpretation of H.B. 319 will compel the conclusion that the maximum time to complete the bypass procedure is sixteen days. *See Akron II*, 854 F.2d at 866 n.8.[9] Such an interpretation would clearly comport with *Ashcroft*.

Moreover, given the statutory safeguard contained in H.B. 319, even an outer limit of twenty-two days does not necessitate a finding of unconstitutionality. Specifically, H.B. 319 allows Ohio courts to shorten or lengthen the maximum

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[8] Since this Court in *Ashcroft* did not examine the time frame for judicial decision making, the question of how to proceed if the court fails to act was not considered. The Ohio statute's constructive authorization provisions squarely address this matter, allowing a physician to take action where the courts have failed to timely act. Ohio Rev. Code Ann. §§2151.85(B)(1), and 2505.073(A). *See infra.* at 24-25.

[9] This calculation is obtained by including weekends and holidays in the time requirements for docketing and deciding the appeal. Such an interpretation is warranted since the statute refers only to *days* when discussing the appeal while it refers to *business days* when discussing the initial hearing.

time limits based on a showing of good cause. Ohio Rev. Code Ann. §2505.073(A). Had this provision been construed in a favorable light, as it should have been, it would have alleviated the Sixth Circuit's concern that an outer limit of twenty-two days could push a pregnant minor into her second trimester. *See Akron II*, 854 F.2d at 867-868.

Finally, the need for clarification on this issue is reflected by the divergence in opinions among the lower courts. *See, Planned Parenthood of Atlanta v. Harris*, 670 F. Supp. 971, 990 (N.D. Ga. 1987) (statute containing bypass procedure of twenty-three days maximum found constitutional); *cf. American College of Obstetricians and Gynecologists v. Thornburgh*, 656 F. Supp. 879, 887-88 (E.D. Pa. 1987) (statute with a twenty-three day bypass procedure unduly infringed on a minor's rights); *Glick v. McKay*, 616 F. Supp. 322, 326 (D. Nev. 1985) (statute with three week bypass procedure raises serious questions of the constitutionality of the statute).

Therefore, it is imperative that the Sixth Circuit's analysis of the expedition provisions of H.B. 319 receive plenary review by this Court in order to provide guidance for both courts and legislatures nationally as well as to cure the defective analysis of the Sixth Circuit.

2. Pleadings, Burden of Proof, and Constructive Authorization.

In analyzing the constitutionality of Ohio's bypass procedure, the Sixth Circuit examined three areas that clearly presented the court with unique questions of first impression. These unique provisions include the statute's pleading requirements, burden of proof, and constructive authorization provisions.

Under the pleading requirements of the statute, a complainant seeking to initiate the bypass procedure must select one of three complaint forms: Complaint Form A contains a statement that she is sufficiently mature and well enough informed to intelligently decide to terminate the pregnancy; Form B contains the allegation that notification

is not in her best interests; and Form C contains both allegations. *Akron Center for Reproductive Health v. Rosen,* 633 F. Supp. 1123, 1137-38 (N.D. Ohio 1986), *aff'd,* 854 F.2d 852 (6th Cir. 1988). The court will consider either one or both of the allegations depending on which form the complainant files. Ohio Rev. Code 2151.85(C)(1), (C)(2), and (C)(3).

The Sixth Circuit recognized at the outset that this framework is unique to H.B. 319. *Akron II,* 854 F.2d at 862. The court proceeded to invalidate this provision on the ground that it burdened the minor's right under *Bellotti II* to show either that she is mature or that parental involvement would not be in her best interests. *Id.*

In arriving at this conclusion, the Sixth Circuit ignored the fundamental rule that "[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." *Ashcroft,* 462 U.S. at 493. Clearly, the pleading mechanism set forth in H.B. 319 is not so complex as to cast an undue burden on a minor's constitutional rights. Rather, the Sixth Circuit engaged in undue speculation in determining that an adolescent minor would be incapable of making a decision as remedial as selecting a proper form. When H.B. 319's pleading provision is viewed in light of the fact that all complainants utilizing the bypass procedure are appointed counsel who could remedy any confusion about which form to file, it is clear that the Sixth Circuit did not accord proper deference to this procedure.

Likewise, the Sixth Circuit inappropriately engaged in speculation in reviewing H.B. 319's constructive authorization provision. *See,* Ohio Rev. Code Ann. §§2151.85(B)(1), 2505.073(A). As discussed, this provision allows an abortion to proceed if either the juvenile court or the court of appeals fails to act on the minor's complaint or appeal within five days. *Id.* Despite recognizing that this provision is designed to protect a minor's right to an expeditious disposition of her petition, the court found the provision to be an undue burden based on its belief that a physician would be unwilling to proceed without some

tangible proof of a court's failure to act. *Akron II,* 854 F.2d at 868-69.

Such speculation plainly violates the maxim of statutory construction noted in *Ashcroft.* Rather than construing the statute in a favorable light, the Sixth Circuit speculated that no tangible proof of the Ohio courts' inaction would be available and that a physician would be unwilling to perform an abortion in the absence of such proof.

The validity of a constructive authorization provision has only been addressed by one other court which found that such a provision put the physician in a "difficult position." *Glick v. McKay,* 616 F. Supp. 322, 325-36 (D. Nev. 1985). However, what is more difficult to comprehend is how a statutory provision which is designed to facilitate an expeditious resolution to a minor's claim can be deemed to be a burden of constitutional magnitude. Such a ruling plainly evinces the need for more guidance on what constitutes an undue burden.

Ohio's burden of proof provision also presented a question of first impression to the Sixth Circuit. *Akron II,* 854 F.2d at 863. This provision requires a minor to prove her claim of maturity and/or best interests by clear and convincing evidence. The Sixth Circuit also improperly analyzed this issue.

In finding the burden of proof provision unconstitutional, the court relied on the standards enumerated in *Mathews v. Eldridge,* 424 U.S. 319 (1976) and its progeny. While *Mathews* is applicable in determining the appropriate standard of proof in an adversarial proceeding, the court erred in extending *Mathews* application to the instant case. The nature of a hearing in a bypass procedure is nonadversarial since no individual or officer of the court is assigned to oppose the petition. The plurality opinion of *Bellotti II* recognized that the waiver proceeding was not meant to be a formal or adversarial proceeding. 443 U.S. at 643 n.22; *See also, Akron Center for Reproductive Health v. Rosen,* 633 F. Supp. 1123, 1137 (N.D. Ohio 1986), *aff'd,*

854 F.2d 852 (1988). Thus, without a heightened degree of proof, the hearing would amount to nothing more than a rubber-stamped approval of the minor's claim. Such a result would undermine the integrity of the bypass procedure and thus cannot be permitted to stand.

These three issues of first impression have been analyzed by the Sixth Circuit in a manner that fails to give the deference and latitude to the state legislature that is necessary in adopting regulations of general applicability to this sensitive area. *See, Akron I,* 462 U.S. at 434; *Ashcroft,* 462 U.S. at 493. The treatment by the lower courts and the lack of guidance on these issues leads to the inescapable conclusion that further review is imperative.

C. THE SIXTH CIRCUIT'S DECISION FINDING OHIO'S PHYSICIAN NOTIFICATION PROVISION UNDULY BURDENSOME FAILS TO PROVIDE PROPER DEFERENCE TO OHIO'S INTEREST IN PROTECTING THE SAFETY AND WELFARE OF ITS MINOR CITIZENS AND IS INCONSISTENT WITH THE GUIDANCE PROVIDED BY THIS COURT.

The Ohio statute provides that the person who will perform the abortion must notify the minor's parents of her decision. Ohio Rev. Code Ann. §2919.12(B). The lower courts found this provision to be unduly burdensome. 633 F. Supp. at 1135, and 854 F.2d at 861. The district court concluded that "[s]ince requiring the physician to effect notification may add to the cost of abortion procedures, *cf., Akron* 462 U.S. at 447, while the state's interest is minimal, this provision unduly burdens a minor woman's right to choose an abortion." 633 F. Supp. at 1135. The Sixth Circuit, agreeing with the district court, found the provision unduly burdensome because "[t]he state has made no showing that this interest [in insuring that immature, unemancipated minors, or minors whose best interest require notification have an adequate opportunity for parental intervention] is advanced by requiring the attending physician, as opposed to another qualified, responsible person, to effectuate notification." 854 F.2d at 862.

The lower courts analyzed the involvement of the physician based on this Court's pronouncement in *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416 (1983) ("Akron I"). The *Akron I* ordinance, found constitutionally infirm, compelled a physician to personally counsel a patient and required certain information disclosed in all cases, regardless of a physician's professional judgment. *Id.* at 446-49. The *Akron I* proscribed provisions are inapplicable to the Ohio statute. The Ohio statute does not compel physicians to counsel patients or their parent, guardian, custodian or specifically designated sibling, stepparent or grandparent.[10] Nor does the Ohio statute invade the province of the physician's professional or medical judgment. Rather, it provides an opportunity for the physician, who is requested to perform the medical procedure, to personally contact the minor's parent. The direct contact between the physician and the parent will allow the physician to obtain any relevant information needed to exercise an appropriate medical judgment, leaving the content of the conversation to the sound discretion of the physician.

No decision from this Court would justify the lower court's treatment of the physician notification requirement. To the contrary, in *H. L. v. Matheson,* while upholding Utah's notification statute, three dissenting Justices found fault with the statute because the substantial state purpose recognized by the majority—encouraging parental transmission of additional information which might prove invaluable to the physician in exercising his best medical judgment—was not furthered where nothing in the statute called for a conversation between physician and parents. 450 U.S. at 443-444 (Marshall, Brennan, and Blackman, JJ.). The Ohio statute addresses this concern without invading the professional judgment of the physician, as proscribed in

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[10] The term "parent" will be used for simplicity to denote parent, guardian, custodian, specifically designated sibling, stepparent or grandparent.

Akron I. The Sixth Circuit ruling that the physician notification requirement is unduly burdensome is not consistent with the guidelines of this Court.

CONCLUSION

For the foregoing reasons Appellant asserts that the questions presented by this appeal are substantial and of broad import and application such that this Court should note probable jurisdiction.

Respectfully submitted,

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APPENDIX

88-805

CASE NO.

Supreme Court, U.S.
FILED
NOV 10 1988
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CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, et al.,

Appellees.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT APPENDIX

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APPENDIX*

TABLE OF CONTENTS

PAGE

A. Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit (Case No. 86-3664), entered August 12, 1988 ..... A-2

B. Order of the United States District Court for the Northern District of Ohio, Eastern Division (Case No. C86-1099A), entered April 22, 1986 ..... A-60

C. Memorandum and Order of the United States District Court for the Northern District of Ohio, Eastern Division (Case No. C86-1099A), entered April 22, 1986 ..... A-61

D. Notice of Appeal, filed in the United States Court of Appeals for the Sixth Circuit (Case No. 86-3664), on October 24, 1988 ..... A-100

* The opinions of the Sixth Circuit and district court have been reproduced verbatim, including any typographical errors.

Opinion of the United States Court of Appeals
for the Sixth Circuit
(Reported at 854 F.2d 852)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 86-3664

Decided and Filed August 12, 1988

* * *

AKRON CENTER FOR REPRODUCTIVE HEALTH, an Ohio corporation; MAX PIERRE GAUJEAN, M.D. individually and on behalf of his patients; PATTY POE, a minor, individually and on behalf of all other similarly situated persons,
Plaintiffs-Appellees,

v.

LYNN SLABY, etc.; et al.,
Defendants,

v.

STATE OF OHIO,
Intervenor-Appellant.

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Before: MARTIN, MILBURN and GUY, Circuit Judges.

MILBURN, Circuit Judge. Intervenor-appellant State of Ohio appeals the judgment of the district court declaring Ohio Amended Substitute House Bill 319 (H.B. 319) unconstitutional. H.B. 319, which enacted Ohio Rev. Code

§§2151.85 and 2505.073 and amended Ohio Rev. Code §2919.12, requires parental notification by physicians who intend to perform abortions on unmarried, unemancipated women under the age of eighteen. For the reasons that follow, we affirm.

I.

On March 21, 1986, plaintiffs filed an action challenging the constitutionality of H.B. 319 (attached hereto as Appendix I) which requires that a physician who intends to perform an abortion on an unmarried, unemancipated minor must notify her parents unless one of several exceptions is present. Plaintiffs were the Akron Center for Reproductive Health, a facility which performs abortions on minors; Dr. Max Pierre Gaujean, a physician who performs abortions at the Akron Center; Patty Poe, an unmarried minor who believed she might be pregnant; and Rachel Roe, an unmarried minor living in the home of one of her parents with her two-year-old son. Roe was refused an abortion at the Akron Center because of the imminent operation of H.B. 319.

Defendants were Gary Rosen, City Prosecutor for the City of Akron; Lynn Slaby, Prosecuting Attorney for Summit County, Ohio; Anthony Celebrezze, Attorney General of the State of Ohio; and Richard Celeste, Governor of the State of Ohio. Only the State of Ohio, as intervenor, is participating in this appeal.[1]

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[1] In the proceedings below, plaintiff Patty Poe was dismissed for lack of standing. Defendants Celebrezze and Celeste were dismissed as defendants. After judgment was entered against the remaining defendants, defendant Slaby appealed. However, on November 4, 1986, Slaby voluntarily dismissed his appeal. Plaintiffs then moved for dismissal on the ground that no defendant bound by the district court's judgment remained in the proceedings. In an order dated April 28, 1987, this court denied plaintiffs' motion. Although plaintiffs seek reexamination of that ruling, it is the law of the case, and we are bound by it. *See SEC v. Youmans*, 729 F.2d 413 (6th Cir.), *cert. denied*, 469 U.S. 1034 (1984).

STATUTORY PROVISIONS

Section 2919.12 provides that no person shall knowingly perform or induce an abortion upon an unemancipated minor unless one of the following circumstances is present:

(1) the person performing the abortion has given at least twenty-four hours actual notice, in person or by telephone, to the parent or guardian of the minor;

(2) one of the woman's parents or her guardian has consented in writing;

(3) a juvenile court has issued an order authorizing the minor to proceed with the abortion in the absence of parental notification; or

(4) the juvenile court has constructively authorized the minor to consent to the abortion through its inaction.

In lieu of parental notification, the statute further provides that notice may be given to a specified sibling, stepparent or grandparent in a limited range of circumstances. The statute also provides that, if the person required to be notified cannot be reached after reasonable effort, the person providing the abortion must give at least forty-eight hours constructive notice by both regular and certified mail to that person. If the person to whom notice is required to be given cannot be reached within the forty-eight hour period, the abortion may proceed.

If the person required to be notified under the statute clearly and unequivocally expresses that he or she does not wish to consult with the pregnant minor prior to her abortion, then the abortion may proceed without further delay. For purposes of the statute, there exists a rebuttable presumption that a woman who is unmarried and under the age of eighteen is unemancipated.

The legislation provides that an individual who violates

this section for the first time is guilty of a misdemeanor of the first degree, and that a second violation is a felony of the fourth degree. Any individual violating the statute is liable to the pregnant minor and her parent, guardian, or custodian for civil compensatory and exemplary damages. Administrative proceedings may also be instituted for noncompliance. Ohio Rev. Code §2731.22(C).

It is an affirmative defense to liability under the statute if the pregnant minor has provided false information about her age, marital status, emancipation, or name and/or address of the person required to receive notice. This defense may be asserted only if the person providing the abortion "did not otherwise have reasonable cause to believe" the information was false. It is also an affirmative defense that compliance was not possible due to an immediate risk to the life or health of the pregnant woman.

The legislation also establishes a procedure through which notification to a parent, guardian, or custodian may be bypassed. This bypass procedure provides that a woman who wishes to have an abortion without notification of her parent, guardian, or custodian may file a complaint in the juvenile court of the county in which she has a residence, in any bordering county, or in the juvenile court of the county in which the facility which would perform the abortion is located. The complaint must contain a statement that the complainant is pregnant, unmarried, unemancipated, under the age of eighteen, and that she wishes to have an abortion without the notification of her parents. The complaint must further contain either or both of the following allegations:

(a) that the complainant is sufficiently mature and well enough informed to intelligently decide whether to have an abortion without notification of her parents;

(b) that one or both of her parents, her guardian, or custodian has engaged in a pattern of physical, sexual, or emotional abuse against her, or that the notification of her parents is otherwise not in her best interests.

The statute further provides that the juvenile court will only rule upon the allegation explicitly pleaded in the complaint. Thus, if the complainant alleges only that she is sufficiently mature and well enough informed to make the decision alone, and the court declines to accept this contention, it must dismiss the complaint without going on to consider whether notification is otherwise not in the complainant's best interests. Only if the complainant makes both allegations can both be considered. The complainant must prove the allegations in her complaint by clear and convincing evidence, and counsel must be appointed to represent the complainant at the hearing in juvenile court.

The statute provides for an expedited procedure to be followed in the bypass proceeding. The hearing must he held not later than the fifth business day after the complaint is filed, and the court must enter judgment immediately after the hearing is concluded. However, if the hearing is not held by the fifth business day after the complaint is filed, the failure to hold the hearing shall be considered a constructive order ("pocket authorization") permitting the complainant to consent to the performance of the abortion without the notification of her parent.

If the court dismisses the complaint, it shall immediately notify the complainant of her right of appeal. Within four days after a notice of appeal is filed, the appeal must be docketed. The appellant shall file her brief within four days after the appeal is docketed, and unless she waives oral argument, the court of appeals shall hear oral argument within five days after the appeal is docketed. Judgment must be entered immediately after the hearing.

Upon motion of the appellant and for good cause shown, the court of appeals may shorten or extend any of the maximum times set forth in the statute. If the judgment is not entered within five days after the appeal is docketed, the failure to enter the judgment shall be considered a

constructive order authorizing the appellant to consent to the performance of the abortion without notice to her parent.[2]

The statute further provides that each hearing must be conducted in a manner that will preserve the anonymity of the complainant. All records must be kept confidential, and the court shall not notify the complainant's parent or guardian that she is pregnant or that she wishes to have an abortion.

DISTRICT COURT'S CONCLUSIONS

On April 22, 1986, the district court filed its memorandum and order enjoining enforcement of the statute. *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986). After disposing of procedural arguments not relevant to the pending appeal, the district court proceeded to the merits of the constitutional claims presented by the plaintiffs.

The district court recognized that the constitution is not violated by a statute which requires notice to the parents of immature, dependent minors seeking abortions. However, the district court went on to conclude that a bypass procedure is constitutionally mandated in order that notification is not required to be given to the parents of mature minors or minors whose best interests do not include parental intervention. The district court concluded that the bypass procedure contained in the Ohio statute was constitutionally deficient for several reasons; *viz.*, the "*constructive order" provision,* which allows an abortion to be performed without parental notification when the court fails to act in a timely manner, was unconstitutionally vague; the statutory requirement that the *notice be given by the physician,* as opposed to some other responsible individual, unduly burdened the minor woman's right of access to an abortion; and the *"clear and*

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[2] The term "days" excludes Saturdays, Sundays and legal holidays, as the respective "period[s] of time prescribed or allowed [are] less than seven days." Ohio R. App. P. 14(A).

convincing evidence" standard of proof constituted an impermissible burden on the right of access to an abortion.

Likewise, the *pleading requirements* contained in the Ohio legislation were found defective because they have the effect of precluding juvenile court judges from making all findings of fact required by controlling precedent. The district court further found that the *length of time required* to complete the bypass procedure was impermissibly long and that the statute's confidentiality provision was inadequate to protect the rights of the minor complainants. However, the district court rejected the plaintiffs' arguments that the *twenty-four hour postnotification waiting period* constituted an impermissible burden on the right to seek an abortion. Finally, the district court rejected the argument that each complainant must be provided with *court-appointed counsel on appeal.*

In summary, the district court concluded:

> [T]here are numerous constitutional defects with the waiver procedure established in section 2151.85 and section 2505.73. To repeat, the provisions (1) establishing constructive authorization; (2) requiring the physician to perform the notice; (3) mandating that a minor prove her maturity or that notification is not in her best interest by "clear and convincing evidence"; and (4) preventing juvenile court judges from making both findings required by *Bellotti II* in all cases, are unconstitutional. In addition, the waiver procedure unconstitutionally fails to ensure (5a) expedition and (5b) confidentiality.

633 F. Supp. at 1144. Because the district court concluded that the unconstitutional provisions could not be severed from the remaining portions of the statute, enforcement of the statute was enjoined in its entirety.[3] The State of Ohio

[3] Because we affirm the district court's judgment as to each challenged element of the Ohio statute, we agree that the impact of our decision and the absence of a severability clause preclude severance of those portions of the statute declared unconstitutional.

appeals, arguing that the parental notification legislation enacted by the Ohio legislature does not unduly burden a minor woman's constitutional right to seek an abortion.

II.
A.

The Supreme Court has recognized that a woman possesses a fundamental constitutional right to seek an abortion. *Roe v. Wade,* 410 U.S. 113 (1973). At the outset, the Court appeared hostile to the notion that any party other than the expectant mother and her physician should be a party to the abortion decision. *See Doe v. Bolton,* 410 U.S. 179 (1973).

Nevertheless, the Supreme Court has recognized that, under certain circumstances, parental intervention is appropriate when the abortion decision is made by a minor.

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults.

Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 74 (1976)(citations omitted). Thus, a state may restrict a minor's constitutional right to an abortion if such restriction is supported by a significant state interest. *Id.* at 75.

The Court has continued to struggle with the extent to which parental intervention into a minor's abortion decision is constitutionally permissible. The statute at issue in *Danforth* required parental consent for an abortion in all cases in which the pregnant woman was unmarried, and under the age of eighteen, unless the abortion was medically necessary to preserve the life of the mother. 428 U.S. at 72. The Court

struck down the statute, concluding that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Id.* at 74.

The Court cautioned, however, that its holding was not tantamount to a declaration that an unmarried minor has an absolute right to receive an abortion without parental intervention.

> We emphasize that our holding that [the Missouri consent statute] is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. The fault with [the statute] is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without a sufficient justification for the restriction.

428 U.S. at 75. The Court's decision clearly emphasizes the premise that the Missouri statute was constitutionally deficient because it gave a third party an absolute right to veto the decision of a minor and her physician that an abortion was appropriate, regardless of the reason for that veto.

The significance of a parental veto was reemphasized by the Court in the companion case of *Bellotti v. Baird*, 428 U.S. 132 (1976) ("Bellotti I"), decided the same day as *Danforth*. In *Bellotti I*, the Court was asked to consider the constitutionality of a Massachusetts statute containing the following provision:

> If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required [before an abortion will be performed]. If one or both of the mother's parents refuse such consent, consent may be obtained by

> order of a judge of the Superior Court for good cause shown, after such hearing as he deems necessary. Such hearing will not require the appointment of a guardian for the mother.

428 U.S. at 134-35. The Supreme Court refused to address the merits of the case, concluding that abstention was appropriate in order to provide the Massachusetts Supreme Judicial Court with an opportunity to construe the statute in a manner consistent with *Danforth*.

Three years later, the Court was required to answer the question upon which it deferred decision in *Bellotti I*. In *Bellotti v. Baird*, 443 U.S. 622 (1979) ("*Bellotti II*"), the Supreme Court considered whether the Massachusetts statute as construed by the Massachusetts Supreme Judicial Court impermissibly burdened the right of a minor to obtain an abortion.

In construing the Massachusetts statute, the Massachusetts Supreme Judicial Court concluded that it required parents to consider only the best interests of their daughter in determining whether she should be permitted to have an abortion. The statutory provision allowing a minor to seek judicial consent required consent to be granted if found to be in the minor's best interests. In considering whether to grant consent notwithstanding parental objections, the judge was required to disregard all considerations not based exclusively upon the minor's best interests. Even if the judge in a judicial consent proceeding concluded that the minor was capable of making an informed decision regarding abortion (*i.e.*, that the minor was "mature"), the judge was entitled to withhold consent if he determined that, notwithstanding her maturity, the best interests of the minor would not be served by an abortion.

Armed with this construction, the Court proceeded to consider whether the Massachusetts statute would survive constitutional challenge. The plurality opinion, written by Justice Powell, recognized once again that a minor is entitled to constitutional rights, although those rights are not

necessarily coequal with the rights of an adult. Three reasons were said to justify this conclusion: the peculiar vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing. *Id.* at 634.

The plurality further recognized that, in enacting its statutory provision, Massachusetts had attempted to reconcile the constitutional right recognized in *Roe* with the interest of the State in encouraging an unmarried pregnant minor to seek the advice of her parents in making an abortion decision. Thus, the relevant inquiry was whether the Massachusetts statute provided "for parental notice and consent in a manner that does not unduly burden the right to seek an abortion." 443 U.S. at 640. In making this determination, the plurality opinion emphasized:

> The abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a state to act with particular sensitivity when it legislates to foster parental involvement in this matter.

Id. at 642.

The starting place for the analysis was the Court's earlier decision in *Danforth*. After reemphasizing that the State may not allow a parent or guardian an absolute veto over a minor's abortion decision, the plurality concluded that if the State should decide to require a pregnant minor to obtain parental consent, it is also required to provide an alternative authorization procedure.

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision

> independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in *Danforth*.

443 U.S. at 643-44 (footnote omitted).

The plurality concluded that the Massachusetts statute was constitutionally deficient for two reasons. First, the statute required parents to be notified of any attempt by the minor to receive judicial consent to have an abortion. The Court struck down this provision after concluding that every minor must be given the opportunity to go directly to court without first consulting or notifying her parents.

The second constitutional deficiency identified by the plurality was that the statute allowed a state court judge to refuse consent to a mature minor if he concluded that the abortion was not in her best interests. The plurality concluded that once a minor has established her maturity, a court is powerless to withhold authorization even though it may believe the procedure is not in the minor's best interests.

> [I]f the minor satisfies a court that she has attained sufficient maturity to make a fully informed decision, she then is entitled to make her abortion decision independently. [Thus, the State of Massachusetts] cannot constitutionally permit judicial disregard of the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made.

Id. at 650 (footnote omitted).

It is important to note that Justice Powell's opinion in *Bellotti II* received the votes of only four justices. Four other justices, concurring in the judgment, concluded that the statute was constitutionally deficient under *Danforth*. "[N]o minor in Massachusetts, no matter how mature and capable of informed decisionmaking, may receive an abortion without the consent of either both her parents or a superior court judge. In every instance, the minor's decision to secure an abortion is subject to an absolute third-party veto." *Bellotti II*, 443 U.S. at 653-54 (Stevens, J., concurring in the judgment). Because an absolute third-party veto was found unconstitutional in *Danforth*, the four concurring justices concluded that this narrower rationale should be utilized to strike down the Massachusetts statute. Although Justice Powell's opinion in *Bellotti II* is only a plurality, it has become the standard by which parental intervention statutes are analyzed. *See City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) ("Akron I").

The Supreme Court first considered the constitutionality of a parental notification (as opposed to a parental consent) statute in *H.L. v. Matheson*, 450 U.S. 398 (1981). At issue in *Matheson* was a Utah statute which required the physician to notify, if possible, the parents of a minor upon whom an abortion was to be performed. The Court concluded that neither the individual plaintiff, nor any of the members of the class she represented, alleged that they were mature enough to make the abortion decision independently or that parental notification was not in their best interests. Accordingly, the only issue before the Court was whether a mere notification requirement violated the constitutional rights of an immature dependent minor. The Court held that it did not.

The Supreme Court once again considered the constitutionality of a parental intervention municipal ordinance in *Akron I*, 462 U.S. at 416. In *Akron I*, the Court affirmed in part and reversed in part the judgment of this court in *Akron Center for Reproductive Health v. City of Akron*, 651 F.2d 1198 (6th Cir. 1981).

Under consideration in *Akron I* were two provisions of an Akron ordinance regarding parental notice and consent. Section 1870.05(A) was a parental notification requirement which provided that no physician could perform an abortion on an unmarried pregnant woman under the age of eighteen without first having given twenty-four hours actual notice to one of her parents, or if the parent could not be reached after reasonable effort, seventy-two hours constructive notice by certified mail to the last known address of the parent. Section 1870.05(B) was a parental consent provision prohibiting abortion upon a woman under the age of fifteen without the informed written consent of one of her parents.

This court struck down section 1870.05(B), the parental consent provision, on the authority of *Danforth*. We concluded that, because the ordinance provided a blanket veto over the minor's decision to have an abortion, it could not withstand constitutional challenge.

With regard to the notification provisions contained in section 1870.05(A), we concluded that, under *Matheson, supra*, a parental notification statute is valid insofar as it applies to immature minors or minors who are unable to establish that their best interests are not served by parental intervention. Because none of the plaintiffs before this court were mature or emancipated minors or minors claiming that notification would not be in their best interests, we refused to find section 1870.05(A) facially unconstitutional.

The Supreme Court affirmed this court's determination that the parental consent requirement for minors under fifteen was unconstitutional. *Akron I*, 462 U.S. at 441-42. Because the statute did not create an opportunity for case-by-case evaluation of maturity of pregnant minors, the statute could not withstand scrutiny under *Bellotti II*. The Supreme Court did not consider the constitutionality of the parental notification provision for women under the age of eighteen. 462 U.S. at 439 n.29. Thus, the provision most like the one to be considered in the present case was not considered by the Supreme Court in *Akron I*.

In *Planned Parenthood Assoc. of Kansas City v Ashcroft*, 462 U.S. 476 (1983), a sharply divided court upheld a parental consent statute. Justice Powell and Chief Justice Burger concluded that because the statute contained a bypass procedure which could be construed consistently with *Bellotti II*, the statute was constitutionally adequate. Dissenting Justices O'Connor, White, and Rehnquist concluded that the consent statute was constitutional because it imposed no undue burden on the minor's decision to have an abortion. Justices Blackmun, Brennan, Marshall, and Stevens concluded that the statute on its face gave either a minor's parents or a judge an absolute veto over the abortion decision and thus was unconstitutional under *Danforth*. Although the parental consent provision at issue in *Ashcroft* was upheld, the precise rationale for the determination is less than clear.

The issues in the present case are significantly different from those considered in the governing Supreme Court precedent. Unlike the consent provisions at issue in *Danforth*, *Bellotti II*, *Akron I*, and *Ashcroft*, the statute under consideration in the present case requires only parental notification. Thus, the threat of an absolute veto is arguably absent. *But see Indiana Planned Parenthood Affiliates Assoc. v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983) ("parental involvement brought about by either consent or notification statutes may result in similar efforts by parents to block the abortion").

Likewise, this case is not governed by the Supreme Court's decision in *Matheson*, as the plaintiffs in the present case have alleged that they are mature, and that parental noficiation is not in their best interests. Thus, the precise issue which a majority of the Court in *Matheson* declined to consider is now before us. Specifically, we must now consider whether a judicial bypass proceeding is mandated when the statute at issue requires only parental notification. We must also consider whether *Bellotti II* presents the appropriate framework for such a bypass proceeding, and, if so, whether the Ohio statute before us complies with the mandate of *Bellotti II*.

In *Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985), the Seventh Circuit was presented with a challenge to an Illinois statute requiring that parents be notified of a minor's decision to have an abortion. Relying on its earlier decision in *Pearson*, 716 F.2d at 1127, the court held that a parental notification statute could withstand constitutional scrutiny only if it provided a bypass procedure consistent with the Supreme Court's decision in *Bellotti II*. This result is entirely consistent with the Supreme Court's observation in *Akron I* that a parental notification requirement would be unconstitutional in the case of a mature minor. 462 U.S. at 441 n.31.[4]

Hartigan was affirmed by an equally divided Supreme Court in a memorandum decision entered on December 14, 1987. *Hartigan v. Zbaraz*, 108 S. Ct. 479 (1987). This disposition leaves "the principle of law presented by the case . . . unsettled." *Laird v. Tatum*, 409 U.S. 824, 838 (1972) (memorandum of Rehnquist, J.); *see also Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 73 n.8 (1977).

Nevertheless, we conclude that the state possesses an interest sufficient to justify the imposition of a parental notification requirement when an immature, dependent minor seeks an abortion. *Matheson*, 450 U.S. at 413. Consistent with *Hartigan*, we further conclude that such a requirement cannot be supported in the case of a mature minor or a minor whose best interests do not include parental notification of the abortion decision. Accordingly, we hold that a parental notification statute must provide a bypass procedure that is consistent with the dictates of *Bellotti II*. We further conclude that the bypass procedure established by Amended Substitute House Bill 319 does not comply with the standards established in *Bellotti II* and its progeny, and we therefore affirm the judgment of the district court enjoining enforcement of the statute in its entirety.

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[4] This observation was made in the context of the Supreme Court's conclusion that abstention was inappropriate because the parental consent statute at issue was not reasonably susceptible of an interpretation rendering it consistent with *Bellotti II*. *See Pearson*, 716 F.2d at 1132 n.2.

III.

The district court found several distinct aspects of the Ohio statute to be constitutionally deficient. They will be discussed seriatim.

A. *Requirement that the Physician Effectuate Notification*

The Ohio statute provides that the person who will perform the abortion must notify the minor's parent of her decision. The district court held that this provision unduly burdens a minor's right to seek an abortion, and we agree.

This court decided a similar issue in *Akron I*, in which we struck down a statutory provision requiring the attending physician to perform preabortion counseling.

> [T]he practice of all three plaintiff clinics has been for the counseling to be conducted by persons other than the doctor who performs the abortion. In the absence of a showing that the state's compelling interest in maternal health would be served by a requirement that such counseling be done by the attending physician, this section is invalid.

651 F.2d at 1207. The Supreme Court upheld this determination.

> We are not convinced . . . that there is as vital a state need for insisting that the physician performing the abortion, or for that matter any physician, personally counsel the patient in the absence of a request. The State's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it. . . . [W]e believe that it is unreasonable for a state to insist that only

> a physician is competent to provide the information and counseling relevant to the informed consent.

462 U.S. at 448-49 (footnote omitted).

Similarly, in the present case, the state's interest is in insuring that immature, unemancipated minors or minors whose best interests require notification have an adequate opportunity for parental intervention. The state has made no showing that this interest is advanced by requiring the attending physician, as opposed to another qualified, responsible person, to effectuate notification. Under these circumstances, we conclude that the requirement that the physician effectuate the notification constitutes an undue burden upon the minor plaintiff's right to seek an abortion.

B. *Pleading Requirement*

As discussed above, *Bellotti II* requires that a bypass procedure must be incorporated in a parental intervention statute in order that minors who are mature or minors whose best interests do not include parental intervention may avoid the intervention requirement. The State of Ohio has developed a pleading requirement which governs the manner in which this determination is made.

A minor who wishes to initiate a bypass proceeding may choose one of three complaint forms. Complaint Form A contains the statement that "complainant alleges that she is sufficiently mature and well enough informed to intelligently decide whether or not to terminate the pregnancy by abortion." J.A. at 149. Complaint Form B contains the allegation that notification of the complainant's parent or guardian would not be in her best interests. J.A. at 151. Complaint Form C contains both allegations.

If the complainant files Complaint Form A, the juvenile court considers only the issue of maturity. If the juvenile court is unable to conclude that the complainant is sufficiently mature to make the decision without notifying her parents, the court will dismiss the complaint without otherwise considering

whether notifying the parent is in the minor's best interests. Similarly, if the complainant files Complaint Form B, the court will consider only the issue of whether terminating the pregnancy without parental notification is in the minor's best interests, and will not consider the issue of whether the complainant is mature enough to make the decision without parental intervention. Only if the complainant files Form C is the court permitted to consider both Form A and Form B issues under the framework created by *Bellotti II*.

No statute imposing or construing a similar pleading requirement in the abortion context has been cited by the parties or discovered in the course of our own research. Nevertheless, we believe that this requirement burdens the minor's risk to receive an abortion by increasing the risk that she will be deprived of an effective opportunity to establish that she is entitled to proceed with an abortion in the absence of parental intervention. Because the State of Ohio has offered no legitimate reason for imposing the pleading requirement, we agree with the district court that this provision cannot withstand constitutional scrutiny.

In *Bellotti II*, Justice Powell indicated that a minor in a bypass proceeding is entitled to show either that she is mature enough to make the abortion decision alone or that parental intervention is not in her best interests. If the complainant fails to satisfy the court that she is sufficiently mature, "she must be permitted to show that an abortion nevertheless would be in her best interests." 443 U.S. at 647. Obviously, the complainant is not in a position to determine whether the juvenile court will be persuaded as to her maturity until long past the pleading stage.

Moreover, the State of Ohio has presented no legitimate justification for imposing its pleading requirement which, in our view, is a "procedural trap." Indeed, it advances the absurd contention that "[a]ny minor claiming to be mature and well enough informed to independently make such an important decision as an abortion should also be mature enough to file her complaint under [the appropriate subsection]." State of Ohio's Brief at 43. We believe that this

attempt to justify the statute's procedural maze cannot withstand even the most cursory examination. Accordingly, we affirm the district court's conclusion that the pleading requirement establish by section 2151.85(C) constitutes an undue burden upon the right to an abortion.

C. *Standard of Proof*

The Ohio statute requires the minor complainant to establish that she is mature or that notification is not in her best interests by clear and convincing evidence. The district court concluded that this standard imposed an undue burden upon the minor's right to seek an abortion.

The appropriate standard of proof to be utilized in a proceeding of this nature is a question of first impression. However, the Supreme Court has carefully articulated general rules to be considered in assessing the constitutionality of the standard of proof in a proceeding which could result in the deprivation of a protected liberty or property interest.

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting *In Re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

In considering whether the standard of proof utilized in a given proceeding complies with due process, a court must consider three factors: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing government interest

supporting use of the challenged procedure." *Santosky v. Kramer*, 455 U.S. 745, 754 (1982); *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

In the present case, the mature minor's interest in exercising her constitutional right to proceed with an abortion without parental intervention is substantial. As discussed above, a woman's right to obtain a first trimester abortion is a fundamental one to be exercised by the pregnant woman upon the advice of her attending physician. *Roe*, 410 U.S. at 164. Even when the pregnant woman is a minor, intervention may be justified only upon the showing of a substantial state interest. *Danforth*, 428 U.S. at 73; *Pearson*, 716 F.2d at 1133. The uniquely private and personal nature of this decision has been consistently recognized by the Supreme Court. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, ____, 106 S. Ct. 2169, 2181-82 (1986).

To support its requirement of the heightened standard of proof, the State of Ohio asserts interests in the facilitation of parental involvement in child rearing. *See Bellotti II*, 443 U.S. at 638. However, the State of Ohio's argument misperceives the purpose of the bypass requirement. As plaintiffs correctly argue, the bypass procedure is not designed to facilitate parental involvement. Rather, it is designed to ensure that a minor who is sufficiently mature or whose best interests do not include parental notification is free to exercise her fundamental right to seek an abortion without the burden imposed by parental intervention. The State's interests in facilitating parental involvement may be legitimately vindicated only *after* a determination that the minor is immature or that her best interests are not served by parental notification. *See Hartigan*, 763 F.2d at 1532.

Thus, the only possible interest that the State may assert in formulating the specific requirements for the bypass proceeding is to ensure that the proceeding is fair and yields a reliable result. The creation of such a procedure will allow the mature minor to proceed without parental intervention, thus preserving the privacy that is the essence of this

fundamental right. *See Thornburgh*, 476 U.S. at ____, 106 S. Ct. at 2181-82. At the same time, a fair and reliable procedure permits the State to vindicate its interests in ensuring that minors who are not mature do not proceed with such an important decision in the absence of parental consultation.

Having so identified the competing interests, we conclude that the risk of erroneous deprivation of the mature minor's constitutional right to proceed without parental intervention is significantly increased by the imposition of the clear and convincing standard of proof. Our conclusion in this regard is bolstered by the Supreme Court's observation that the clear and convincing standard of proof has generally been employed "to preserve fundamental fairness in a variety of *government-initiated* proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.'" *Santosky*, 455 U.S. at 756 (quoting *Addington*, 441 U.S. at 425) (emphasis supplied). In the present case, the Ohio statute has the effect of placing the primary allocation of the risk of error upon the minor complainant, the precise individual whose fundamental liberty interest is at stake. We agree with the district court that the imposition of this heightened standard of proof unduly burdens the minor plaintiff's right to seek an abortion, and thus cannot withstand constitutional scrutiny.[5]

[5] The State of Ohio also argues that the ex parte nature of the bypass proceeding mandates imposition of the clear and convincing standard of proof. According to the State, the imposition of a lesser standard would command an order in the minor's favor merely by the filing of a complaint and the holding of a heraing. We reject this argument, as it fails to take into consideration the Supreme Court's admonition that a minor in a bypass proceeding must *convince* the juvenile court that she is sufficiently mature or that parental intervention is not in her best interests. Plaintiffs do not argue that the juvenile court in a bypass proceeding is required to act as a mere "rubber stamp" of the minor's decision to abort, and we would not in any instance sanction such a view.

D. *Confidentiality*

Justice Powell's opinion in *Bellotti II* requires that the bypass procedures contained in a parental intervention statute "must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity . . . ." 443 U.S. at 644. In the present case, the district court held that the Ohio statute fails to ensure the requisite degree of privacy. We agree. Section 2151.85(F) provides in relevant part:

> Each hearing under this section shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section shall be kept confidential and are not public records under section 149.43 of the revised code.

Section 2505.073(B) provides:

> All proceedings [on appeal from the denial of a judicial bypass] shall be conducted in a manner that will preserve the anonymity of the appellant on appeal. All papers and records that pertain to an appeal under this section shall be kept confidential and not public records under section 149.43 of the revised code.

The complaint form instructs the minor that she is entitled to proceed under a pseudonym, although she must sign her real name and give an address where the court can contact her throughout the bypass proceeding unless she is represented by an attorney.

"The issue in this case, whether the statute's provisions specifically provide for, and thus assure, anonymity during a waiver of notice hearing, has received little attention." *Hartigan*, 763 F.2d at 1542. The issue was cursorily addressed by the Supreme Court in *Ashcroft*, 462 U.S. at 491 n.16. The Missouri statute under consideration in *Ashcroft* permitted

the minor to use her initials on the petition. This measure was sufficient, in the court's view, to assure the petitioner's confidentiality. *Id.*[6]

In *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283 (3d Cir. 1984), *aff'd on other grounds*, 476 U.S. 747 (1986), the Court enjoined enforcement of Pennsylvania's parental consent statute pending state promulgation of regulations to ensure that the bypass proceeding be conducted with anonymity. The Court cautioned that, in order to withstand constitutional scrutiny, "the alternative judicial procedure must be an established and practical avenue and may not rely solely on generally stated principles of availability, confidentiality, and form." 737 F.2d at 297.

Similarly, in *Hartigan*, 763 F.2d at 1542-44, the court enjoined enforcement of the notification statute pending promulgation of rules assuring confidentiality in the bypass proceeding. Because the statute failed to contain "any specific provisions to assure the minor's anonymity at the waiver hearing," *id.* at 1543, and because the statute did not provide for disposition of documents following completion of the hearing, the Seventh Circuit concluded that it could not be enforced as written.

In *Planned Parenthood Ass'n of Atlanta v. Harris*, 670 F. Supp. 971 (N.D. Ga. 1987), the court concluded that the anonymity provisions contained in the Georgia statute were insufficient. Although the rules allowed the petition to be styled using only the minor's initials, she was required to

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[6] The Missouri statute under consideration in *Ashcroft* also required the petitioner or next friend to provide the age of the complainant and the name and address of each of her parents. The minor or her next friend was required to sign the petition. The Supreme Court did not consider the impact of these statutory provisions upon the minor's right to proceed anonymously. "Courts since *Ashcroft* have uniformly read footnote 16 [in *Ashcroft*] as approving only the use of initials in bypass proceedings." *Planned Parenthood Ass'n of Atlanta v. Harris*, 670 F. Supp. 971, 991 n.25 (N.D. Ga. 1987).

sign her full name at the end of the petition and was also required to provide her Social Security number and date of birth. The Georgia rules further did not provide for the sealing of such records. Accordingly, the court concluded that the minor's confidentiality was not sufficiently preserved.

Similarly, in *American College of Obstetricians and Gynecologists v. Thornburgh*, 656 F. Supp. 879 (E.D. Pa. 1987), the court considered the adequacy of rules promulgated by the Pennsylvania Supreme Court to assure confidentiality in the bypass proceedings. Because the rule could be interpreted to require the minor complainant to sign her real name to the petition, the court held that there was an insufficient guarantee of anonymity.

Although we agree with the district court that the State of Ohio has taken "laudable steps toward complying with the *Bellotti II*'s anonymity requirement," we believe, as did the district court, that the minor's anonymity is not sufficiently preserved. 633 F. Supp. at 1143. In our view, the most significant defect is that the minor is required to sign her full name at the end of the petition and tc provide an address where she can be reached unless she is represented by an attorney.[7]

We further conclude that the remaining provisions regarding confidentiality amount to nothing more than the mere precatory language found offensive in *Thornburgh* and *Hartigan, supra*. Accordingly, we believe these concerns support the district court's conclusion that the waiver provision is constitutionally defective because it fails to ensure that the minors who use it will be protected with sufficient anonymity.

[7] We note that in *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1025 (1st Cir. 1981), this difficulty was eliminated by a standing order which required that the minor proceed under a pseudonym and that an affidavit containing her real identity be kept in a separate sealed file. We do not intimate, of course, that this is the only acceptable manner for ensuring that the papers filed in the juvenile court protect the minor's right to anonymity in these proceedings.

However, we are not in full agreement with the district court's conclusions regarding certain other provisions of the Ohio statute and their effect upon the complainant's right to anonymity. Specifically, the district court believed that the venue provisions contained in the Ohio statute deprive the complainant of anonymity. Section 2151.85(A) provides that the bypass proceeding may be initiated:

> [I]n the juvenile court of the county in which [complainant] has a residence or a legal settlement, in the juvenile court of any county that borders to any extent the county in which she has a residence or legal settlement, or in the juvenile court of the county in which the hospital, clinic, or other facility in which the abortion would be performed or induced is located . . . .

The district court concluded that "[t]he venue provisions prevent [complainant] from going to a county where she might be assured of anonymity." 633 F. Supp. at 1144. We disagree. The venue provisions contained in the Ohio statute permit the minor who fears disclosure of her activities to travel to any county in the state to initiate a bypass proceeding and to have the abortion performed. Under these circumstances, we cannot conclude that the venue provisions are in themselves constitutionally defective. *See Harris*, 670 F. Supp. at 992; *Margaret S. v. Treen*, 597 F. Supp. 636, 652 (E.D. La. 1984).

The district court also expressed concern that the minor complainant's right to anonymity would be compromised by the operation of Ohio Rev. Code § 2151.421 (Page Supp. 1985) which requires attorneys and other professionals to report incidents of child abuse or neglect discovered during the course of their professional responsibilities. This possible infringement upon the minor plaintiff's right to anonymity has been cured by an amendment to the statute. *See* Ohio Rev. Code § 2151.421 (Page Supp. 1987).

Finally, the district court concluded that the statute's anonymity provisions were insufficient because, when read

in connection with Ohio Juv. R. 16 and 2(16) and Ohio Rev. Code § 2151.28 (Page 1976), they would require the minor's parent to be notified of the impending bypass proceeding. Such a construction would be patently unconstitutional. *See Akron I*, 462 U.S. at 441 n.31; *Bellotti II*, 443 U.S. at 647 ("[E]very minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents."). We believe Ohio courts would construe the provisions so that the specific would govern the general, and thus any conflict would be avoided. *See Acme Eng'g Co. v. Jones*, *150 Ohio St.* 423, 83 N.E.2d 202 (1948); *CADO Business Sys. v. Board of Educ.*, 8 Ohio App. 3d 385, 457 N.E.2d 939 (1983); *see also Tamele v. Brinkman*, 30 Ohio Misc. 49, 284 N.E.2d 210 (1972).

In sum, while we do not completely agree with the district court's evaluation of certain discrete aspects of the anonymity provisions contained in the Ohio bypass proceeding, we conclude that the district court was correct in holding that the confidentiality provision is insufficient to comply with the dictates of *Bellotti II*. Accordingly, the judgment of the district court enjoining operation of the statute on this ground is affirmed.

E. *Expedition*

The plurality opinion in *Bellotti II* mandates that the bypass proceeding be held with "sufficient expedition to provide an effective opportunity for an abortion to be obtained." 443 U.S. at 644. The Ohio statute under consideration in the present case contemplates a procedure that will span a maximum of twenty-two days.[9] The district court concluded that the time frame is too long to comply with the dictates of *Bellotti II*.

[9] The State belatedly suggests in its reply brief that the maximum is arguably only sixteen days. Our reading of the statute at issue and Ohio R. App. P. 14(A) convinces us that the twenty-two day figure is correct. The State has consistently argued throughout the course of these proceedings that a length of twenty-two days is constitutionally permissible.

As indicated above, the term "expediency" in *Bellotti II* was defined only in terms of the preservation of an effective opportunity for an abortion to be obtained. Only once has the Supreme Court expanded upon this definition. In *Ashcroft*, the Supreme Court analyzed the expeditiousness of the bypass proceeding created by Missouri law.

> As to expedition of appeals, § 188.028.2(6) provides in relevant part:
>
> "The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section."
>
> We believe this section provides the framework for a constitutionally sufficient means of expediting judicial proceedings. Immediately after the effective date of this statutory enactment, the District Court enjoined enforcement. No unemancipated pregnant minor has been required to comply with this section. Thus, to this point in time, there has been no need for the State Supreme Court to promulgate rules concerning appellate review. This is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions.

462 U.S. at 491 n.16.

The parties in the present case agree that the framework created by Missouri law at the time of the *Ashcroft* decision envisioned a process spanning sixteen or seventeen days (depending upon whether the minor filed by her notice of appeal on the day of the decision or the following day) plus a period of sufficient expedition at both the trial level and

the appellate level during which the decision would be made. The precise time limits for these periods of sufficient expedition were to be governed by rules promulgated by the Missouri Supreme Court.

Thus, the Supreme Court in *Ashcroft* did not define the constitutionally permissible outer limits of a time frame that is sufficiently expedient under *Bellotti II*. Rather, the Court merely assumed that the State of Missouri would promulgate rules consistent with the need for expedition.[9]

Conversely, in the present case, no such flexibility exists. Instead, we are faced with a bypass procedure spanning twenty-two days, arguably almost a week longer than the procedure envisioned by Missouri law.

The court below, and other courts considering this issue, have recognized that minors often do not learn of their pregnancies until a late stage in the first trimester. "Studies show that the problem [of delay] is particularly acute for pregnant minors, who are more likely to seek abortions at a later stage of gestation than are older women. Nationally, over half of the abortions obtained by adolescents are performed at 9 or more weeks of gestation." *Thornburgh*, 656 F. Supp. at 887. The Supreme Court has recognized that "prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending

[9] Mo. R. Civ. P. 84.02 was amended to provide that appeals in notification bypass proceedings "shall be expedited." The Eighth Circuit has held that the Missouri statute and rule for expedited appeal provides sufficient expedition under *Ashcroft* and *Bellotti II*. *T.L.J. v. Webster*, 792 F.2d 734, 737-38 (8th Cir. 1986).

We note that the discussion of expediency in *Ashcroft* was contained in the opinion of Justice Powell, in which only Chief Justice Burger concurred. Nevertheless, a majority of the Court upheld the statute's constitutionality, as Justices O'Connor, White, and Rehnquist concluded that it imposed no undue burden on the minor's right to undergo an abortion.

physician." *Roe*, 410 U.S. at 164. As the pregnancy advances, the state's interests in protecting maternal health and "the potentiality of human life" represented by the fetus justify greater state regulation. *Id.* at 164. Accordingly, time lost during the first trimester is especially critical.

In *Thornburgh*, 656 F. Supp. at 887-88, the court held that a bypass proceeding taking twenty-three days unduly infringed upon the minor's right to obtain an abortion. Because a minor who would be forced to pursue an appeal process consuming twenty-three days might well be pushed into the second trimester of her pregnancy, the court concluded that the twenty-three day procedure was unconstitutional.

Similarly, in *Glick v. McKay*, 616 F. Supp. 322, 326 (D. Nev. 1985), the court concluded that a bypass proceeding which could last for three weeks "raises serious questions of the statute's constitutionality because time lost in the first trimester is crucial." Accordingly, enforcement of the statute was enjoined. *Cf. Harris*, 670 F. Supp. at 971 (statute containing time frame similar to one at issue in present case upheld).

We agree with the district court and the courts in *Thornburgh* and *Glick* that time lost during the first trimester is, indeed, crucial. Although the Ohio legislature has made a commendable attempt to provide an expedited proceeding for the determination of maturity, we conclude that the possible twenty-two day delay established by House Bill 319 unduly burdens the minor's right to obtain an abortion.

F. *The "Pocket Authorization" Provision*

The Ohio statute provides that if the juvenile court fails to hold a hearing on the complainant's petition within five business days after it is filed, the minor is entitled to proceed with the abortion without parental notification. Similarly, if the court of appeals does not act upon the petition within five days after the appeal is docketed, the minor is entitled

to proceed without parental notification or judicial authorization.

The district court struck down these provisions on the ground that they are unconstitutionally vague. Because we believe that the constructive order provisions unduly burden the minor's right to obtain an abortion, we affirm the judgment of the district court insofar as it found these provisions to be constitutionally deficient.

In *Glick*, 616 F. Supp. at 325-26, the court preliminarily enjoined enforcement of a provision substantially identical to the ones at issue in the present case.

> [T]he provision for a "pocket approval" puts the physician in a difficult position. If the district court does nothing, authorization for the physician to perform the abortion is deemed to have been granted. The physician is subjected to liability if the abortion is performed without authorization, but the physician has nothing tangible to rely upon to prove compliance with the law. In the case of "pocket approval," no record is made of the authorization.

Id. at 325 (citation omitted). We agree with the court in *Glick* that a "pocket approval" provision "puts the physician in a difficult position," and we go a step further and hold that the operation of this procedure places an undue burden upon the minor's right to seek an abortion.

We recognize that the "pocket approval" provisions were ostensibly inserted into the statute in order to protect the minor's right to an expedient disposition of her petition. Nevertheless, we believe that the practical effect of such a provision is to frustrate that right. The minor entitled to avail herself of the "pocket approval" provision is left with nothing tangible to show the physician in support of her authority to proceed in the absence of parental or express judicial authorization. Given the severe penalties imposed upon a physician who performs an abortion without adequate

authorization, we believe it is clear that a physician would be unwilling to proceed under such circumstances. The resulting confusion can only facilitate delay at a time when each passing day pushes the minor complainant closer to the end of the first trimester. Accordingly, we conclude that the "pocket approval" provisions contained in the Ohio statute are unduly burdensome.

G. *Twenty-Four Hour Waiting Period And Appointment of Counsel on Appeal*

In the proceedings below, the district court rejected plaintiffs' argument that the twenty-four hour postnotification waiting period is unconstitutional. Furthermore, the district court rejected the argument that the statute is constitutionally deficient because it fails to provide for the appointment of counsel on appeal. Although plaintiffs request that we reverse the district court's holding on these issues, we note that they have failed to perfect a cross-appeal.

This court has held that "filing a notice of cross-appeal is jurisdictional where an appellee wishes to attack part of a final judgment in order to enlarge his rights or reduce those of his adversary." *SEC v. Youmans*, 729 F.2d 413, 415 (6th Cir.), *cert. denied*, 469 U.S. 1034 (1984); *see also Ford Motor Credit Co. v. Aetna Casualty & Sur. Co.*, 717 F.2d 959 (6th Cir. 1983).

> It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the right of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.

United States v. American Ry. Express Co., 265 U.S. 425, 435 (1924). In the present case, plaintiffs attempt to "enlarge

their own rights" by asking this court to strike down statutory provisions upon which the district court has placed its imprimatur. In the absence of a cross-appeal, we are powerless to do so.

IV.

In conclusion, our review of the Ohio statute in light of the governing Supreme Court precedent convinces us that the district court was correct in holding that: (1) a *Bellotti II* bypass procedure is required in statutes providing for parental notification when a minor seeks an abortion; and (2) the bypass procedure created by Ohio law is constitutionally deficient in that it requires the attending physician to effectuate the notification; that it contains a burdensome pleading requirement for which no legitimate justification is advanced; that it imposes on the minor an unduly burdensome standard of proof; that it fails to sufficiently preserve the minor's right to confidentiality and expediency; and that it contains "pocket approval" provisions which are unduly burdensome.

Accordingly, for the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX I

1985 Session Laws—Full Text

AMENDED SUBSTITUTE HOUSE
BILL NO. 319

Act Effective Date:	3-24-86
Date Passed:	11-20-85
Date Approved by Governor:	Becomes law without governor's signature
Date Filed:	12-23-85
File Number:	125
Chief Sponsor:	LUEBBERS

General and Permanent Nature: Per the Director of the Ohio Legislative Service Commission, this Act's section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

To amend sections 149.43, 2305.11, 2919.12, and 4731.22 and to enact sections 2151.85 and 2505.073 of the Revised Code to specify that before an abortion can be performed or induced upon an unmarried, unemancipated woman under 18 years of age, either notification must be given to the woman's parent, guardian, or custodian, notification must be given to a specified stepparent, grandparent, or sibling over 21 years of age upon request of the woman and upon the filing of affidavits alleging fear of abuse by the parent, guardian, or custodian, an order of the juvenile court authorizing the woman to act without notice to the parent, guardian, or custodian must be obtained, or a constructive order of the juvenile court or court of appeals authorizing the woman to act without such notice must be obtained due to the court's inaction: and to make violations of this requirement specific grounds for disciplining a physician.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 149.43, 2305.11, 2919.12, and 4731.22 be amended, and sections 2151.85 and 2505.073 of the Revised Code be enacted to read as follows:

149.43 Availability of public records [Eff. 3-24-86]

(A) As used in this section:

(1) "Public record" means any record that is kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, except medical records, records pertaining to adoption, probation, and parole proceedings. RECORDS PERTAINING TO ACTIONS UNDER SECTION 2151.85 OF THE REVISED CODE AND TO APPEALS OF ACTIONS ARISING UNDER THAT SECTION, records listed in division (A) of section 3107.42 of the Revised Code, trial preparation records, confidential law enforcement investigatory records, and records the release of which is prohibited by state or federal law.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose his identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life of physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information thait is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(B) All public records shall be promptly prepared and made available for inspection to any member of the general public at all reasonable times during regular business hours. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time. In order to facilitate broader access to public records, governmental units shall maintain public records in such a manner that they can be made available for inspection in accordance with this division.

(C) Chapter 1347 of the Revised Code does not limit the provisions of this section.

2151.85 Minor female's complaint for abortion; hearing; appeal [Eff. 3-24-86]

(A) A WOMAN WHO IS PREGNANT, UNMARRIED, UNDER EIGHTEEN YEARS OF AGE, AND UNEMANCIPATED AND WHO WISHES TO HAVE AN ABORTION WITHOUT THE NOTIFICATION OF HER PARENTS, GUARDIAN, OR CUSTODIAN MAY FILE A COMPLAINT IN THE JUVENILE COURT OF THE COUNTY

IN WHICH SHE HAS A RESIDENCE OR LEGAL SETTLEMENT, IN THE JUVENILE COURT OF ANY COUNTY THAT BORDERS TO ANY EXTENT THE COUNTY IN WHICH SHE HAS A RESIDENCE OR LEGAL SETTLEMENT, OR IN THE JUVENILE COURT OF THE COUNTY IN WHICH THE HOSPITAL, CLINIC, OR OTHER FACILITY IN WHICH THE ABORTION WOULD BE PERFORMED OR INDUCED IS LOCATED, REQUESTING THE ISSUANCE OF ANY ORDER AUTHORIZING HER TO CONSENT TO THE PERFORMANCE OR INDUCEMENT OF AN ABORTION WITHOUT THE NOTIFICATION OF HER PARENTS, GUARDIAN, OR CUSTODIAN.

THE COMPLAINT SHALL BE MADE UNDER OATH AND SHALL INCLUDE ALL THE FOLLOWING:

(1) A STATEMENT THAT THE COMPLAINANT IS PREGNANT;

(2) A STATEMENT THAT THE COMPLAINANT IS UNMARRIED, UNDER EIGHTEEN YEARS OF AGE, AND UNEMANCIPATED;

(3) A STATEMENT THAT THE COMPLAINANT WISHES TO HAVE AN ABORTION WITHOUT THE NOTIFICATION OF HER PARENTS, GUARDIAN, OR CUSTODIAN;

(4) AN ALLEGATION OF EITHER OR BOTH OF THE FOLLOWING:

(a) THAT THE COMPLAINANT IS SUFFICIENTLY MATURE AND WELL ENOUGH INFORMED TO INTELLIGENTLY DECIDE WHETHER TO HAVE AN ABORTION WITHOUT THE NOTIFICATION OF HER PARENTS, GUARDIAN, OR CUSTODIAN;

(b) THAT ONE OR BOTH OF HER PARENTS, HER GUARDIAN, OR HER CUSTODIAN WAS ENGAGED IN A PATTERN OF PHYSICAL, SEXUAL, OR EMOTIONAL ABUSE AGAINST HER, OR THAT THE NOTIFICATION OF

HER PARENTS, GUARDIAN, OR CUSTODIAN OTHERWISE IS NOT IN HER BEST INTEREST.

(5) A STATEMENT AS TO WHETHER THE COMPLAINANT HAS RETAINED AN ATTORNEY AND, IF SHE HAS RETAINED AN ATTORNEY, THE NAME, ADDRESS, AND TELEPHONE NUMBER OF HER ATTORNEY.

(B)(1) THE COURT SHALL FIX A TIME FOR A HEARING ON ANY COMPLAINT FILED PURSUANT TO DIVISION (A) OF THIS SECTION AND SHALL KEEP A RECORD OF ALL TESTIMONY AND OTHER ORAL PROCEEDINGS IN THE ACTION. THE COURT SHALL HEAR AND DETERMINE THE ACTION AND SHALL NOT REFER ANY PORTION OF IT TO A REFEREE. THE HEARING SHALL BE HELD AT THE EARLIEST POSSIBLE TIME, BUT NOT LATER THAN THE FIFTH BUSINESS DAY AFTER THE DAY THAT THE COMPLAINT IS FILED. THE COURT SHALL ENTER JUDGMENT ON THE COMPLAINT IMMEDIATELY AFTER THE HEARING IS CONCLUDED. IF THE HEARING REQUIRED BY THIS DIVISION IS NOT HELD BY THE FIFTH BUSINESS DAY AFTER THE COMPLAINT IS FILED, THE FAILURE TO HOLD THE HEARING SHALL BE CONSIDERED TO BE A CONSTRUCTIVE ORDER OF THE COURT AUTHORIZING THE COMPLAINANT TO CONSENT TO THE PERFORMANCE OR INDUCEMENT OF AN ABORTION WITHOUT THE NOTIFICATION OF HER PARENT, GUARDIAN, OR CUSTODIAN, AND THE COMPLAINANT AND ANY OTHER PERSON MAY RELY ON THE CONSTRUCTIVE ORDER TO THE SAME EXTENT AS IF THE COURT ACTUALLY HAD ISSUED AN ORDER UNDER THIS SECTION AUTHORIZING THE COMPLAINANT TO CONSENT TO THE PERFORMANCE OR INDUCEMENT OF AN ABORTION WITHOUT SUCH NOTIFICATION.

(2) THE COURT SHALL APPOINT A GUARDIAN AD LITEM TO PROTECT THE INTERESTS OF THE COMPLAINANT AT THE HEARING THAT IS HELD PURSUANT TO THIS SECTION. IF THE COMPLAINANT

HAS NOT RETAINED AN ATTORNEY, THE COURT SHALL APPOINT AN ATTORNEY TO REPRESENT HER. IF THE GUARDIAN AD LITEM IS AN ATTORNEY ADMITTED TO THE PRACTICE OF LAW IN THIS STATE, THE COURT ALSO MAY APPOINT HIM TO SERVE AS THE COMPLAINANT'S ATTORNEY.

(C)(1) IF THE COMPLAINANT MAKES ONLY THE ALLEGATION SET FORTH IN DIVISION (A)(4)(a) OF THIS SECTION AND IF THE COURT FINDS, BY CLEAR AND CONVINCING EVIDENCE, THAT THE COMPLAINANT IS SUFFICIENTLY MATURE AND WELL ENOUGH INFORMED TO DECIDE INTELLIGENTLY WHETHER TO HAVE AN ABORTION, THE COURT SHALL ISSUE AN ORDER AUTHORIZING THE COMPLAINANT TO CONSENT TO THE PERFORMANCE OR INDUCEMENT OF AN ABORTION WITHOUT THE NOTIFICATION OF HER PARENTS, GUARDIAN, OR CUSTODIAN. IF THE COURT DOES NOT MAKE THE FINDING SPECIFIED IN THIS DIVISION, IT SHALL DISMISS THE COMPLAINT.

(2) IF THE COMPLAINANT MAKES ONLY THE ALLEGATION SET FORTH IN DIVISION (A)(4)(b) OF THIS SECTION AND IF THE COURT FINDS, BY CLEAR AND CONVINCING EVIDENCE, THAT THERE IS EVIDENCE OF A PATTERN OF PHYSICAL, SEXUAL, OR EMOTIONAL ABUSE OF THE COMPLAINANT BY ONE OR BOTH OF HER PARENTS, HER GUARDIAN, OR HER CUSTODIAN, OR THAT THE NOTIFICATION OF THE PARENTS, GUARDIAN, OR CUSTODIAN OF THE COMPLAINANT OTHERWISE IS NOT IN THE BEST INTEREST OF THE COMPLAINANT, THE COURT SHALL ISSUE AN ORDER AUTHORIZING THE COMPLAINANT TO CONSENT TO THE PERFORMANCE OR INDUCEMENT OF AN ABORTION WITHOUT THE NOTIFICATION OF HER PARENTS, GUARDIAN, OR CUSTODIAN. IF THE COURT DOES NOT MAKE THE FINDING SPECIFIED IN THIS DIVISION, IT SHALL DISMISS THE COMPLAINT.

(3) IF THE COMPLAINANT MAKES BOTH OF THE ALLEGATIONS SET FORTH IN DIVISIONS (A)(4)(a) AND

(b) OF THIS SECTION, THE COURT SHALL PROCEED AS FOLLOWS:

(a) THE COURT FIRST SHALL DETERMINE WHETHER IT CAN MAKE THE FINDING SPECIFIED IN DIVISION (C)(1) OF THIS SECTION AND, IF SO, SHALL ISSUE AN ORDER PURSUANT TO THAT DIVISION. IF THE COURT ISSUES SUCH AN ORDER, IT SHALL NOT PROCEED PURSUANT TO DIVISION (C)(3)(b) OF THIS SECTION. IF THE COURT DOES NOT MAKE THE FINDING SPECIFIED IN DIVISION (C)(1) OF THIS SECTION, IT SHALL PROCEED PURSUANT TO DIVISION (C)(3)(b) OF THIS SECTION.

(b) IF THE COURT PURSUANT TO DIVISION (C)(3)(a) OF THIS SECTION DOES NOT MAKE THE FINDING SPECIFIED IN DIVISION (C)(1) OF THIS SECTION, IT SHALL PROCEED TO DETERMINE WHETHER IT CAN MAKE THE FINDING SPECIFIED IN DIVISION (C)(2) OF THIS SECTION AND, IF SO, SHALL ISSUE AN ORDER PURSUANT TO THAT DIVISION. IF THE COURT DOES NOT MAKE THE FINDING SPECIFIED IN DIVISION (C)(2) OF THIS SECTION, IT SHALL DISMISS THE COMPLAINT.

(D) THE COURT SHALL NOT NOTIFY THE PARENTS, GUARDIAN, OR CUSTODIAN OF THE COMPLAINANT THAT SHE IS PREGNANT OR THAT SHE WANTS TO HAVE AN ABORTION.

(E) IF THE COURT DISMISSES THE COMPLAINT, IT IMMEDIATELY SHALL NOTIFY THE COMPLAINANT THAT SHE HAS A RIGHT TO APPEAL UNDER SECTION 2505.073 OF THE REVISED CODE.

(F) EACH HEARING UNDER THIS SECTION SHALL BE CONDUCTED IN A MANNER THAT WILL PRESERVE THE ANONYMITY OF THE COMPLAINANT. THE COMPLAINT AND ALL OTHER PAPERS AND RECORDS THAT PERTAIN TO AN ACTION COMMENCED UNDER THIS SECTION SHALL BE KEPT CONFIDENTIAL AND ARE NOT PUBLIC RECORDS UNDER SECTION 149.43 OF THE REVISED CODE.

(G) THE CLERK OF THE SUPREME COURT SHALL PRESCRIBE COMPLAINT AND NOTICE OF APPEAL FORMS THAT SHALL BE USED BY A COMPLAINANT FILING A COMPLAINT UNDER THIS SECTION AND BY AN APPELLANT FILING AN APPEAL UNDER SECTION 2505.073 OF THE REVISED CODE. THE CLERK OF EACH JUVENILE COURT SHALL FURNISH BLANK COPIES OF THE FORMS, WITHOUT CHARGE, TO ANY PERSON WHO REQUESTS THEM.

(H) NO FILING FEE SHALL BE REQUIRED OF, AND NO COURT COSTS SHALL BE ASSESSED AGAINST, A COMPLAINANT FILING A COMPLAINT UNDER THIS SECTION OR AN APPELLANT FILING AN APPEAL UNDER SECTION 2505.073 OF THE REVISED CODE.

(I) AS USED IN THIS SECTION, "UNEMANCIPATED" MEANS THAT A WOMAN WHO IS UNMARRIED AND UNDER EIGHTEEN YEARS OF AGE HAS NOT ENTERED THE ARMED SERVICES OF THE UNITED STATES, HAS NOT BECOME EMPLOYED AND SELF-SUBSISTING, OR HAS NOT OTHERWISE BECOME INDEPENDENT FROM THE CARE AND CONTROL OF HER PARENT, GUARDIAN, OR CUSTODIAN.

2305.11 Time limmitations for bringing certain actions; extensions; effect of legal disability [Eff. 3-24-86]

(A) An action for libel, slander, malicious prosecution, false imprisonment, or malpractice, including an action for malpractice against a physician, podiatrist, hospital, or dentist, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued.

If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

(B) In no event shall any medical claim against a physician, podiatrist, or a hospital or a dental claim against a dentist be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this section for filing such a malpractice action against a physican, podiatrist, hospital, or dentist apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action for malpractice against a physician or hospital.

(C) A civil action for ~~nonconsensual~~ UNLAWFUL abortion pursuant to section 2919.12 of the Revised Code shall be commenced within one year after the abortion.

(D) As used in this section:

(1) "Hospital" includes any person, corporation, association, board, or authority responsible for the operation of any hospital licensed or registered in the state, including without limitation those which are owned or operated by the state, political subdivisions, any person, corporation, or any combination thereof. Such term further includes any person, corporation, association, board, entity, or authority responsible for the operation of any clinic that employs a full-time staff of physicians practicing in more than one recognized medical specialty and rendering advice, diagnosis, care and treatment to individuals. It does not include any hospital operated by the government of the United States or any branch thereof.

(2) "Physician" means all persons who are licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board.

(3) "Medical claim" means any claim asserted in any civil action against a physican, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person.

(4) "Podiatrist" means all persons who are licensed to practice podiatric medicine and surgery by the state medical board.

(5) "Dentist" means all persons licensed to practice dentistry by the state dental board.

(6) "Dental claim" means any claim asserted in any civil action against a dentist arising out of a dental operation or the dental diagnosis, care, or treatment of any person.

2505.073 Appeal from dismissal of minor female's complaint for abortion [Eff. 3-24-86]

(A) A COMPLAINANT WHOSE COMPLAINT UNDER SECTION 2151.85 OF THE REVISED CODE IS DISMISSED BY A JUVENILE COURT, MAY APPEAL IN ACCORDANCE WITH THIS SECTION WITHIN FOUR DAYS AFTER A NOTICE OF APPEAL IS FILED IN AN ACTION ARISING UNDER THAT SECTION. THE CLERK OF THE JUVENILE COURT SHALL DELIVER A COPY OF THE NOTICE OF APPEAL AND THE RECORD ON APPEAL TO THE CLERK OF THE COURT OF APPEALS NAMED IN THE NOTICE. UPON RECEIPT OF THE NOTICE AND RECORD, THE CLERK OF THE COURT OF APPEALS SHALL PLACE THE APPEAL ON THE DOCKET OF THE COURT.

THE APPELLANT SHALL FILE HER BRIEF WITHIN FOUR DAYS AFTER THE APPEAL IS DOCKETED. UNLESS THE APPELLANT WAIVES THE RIGHT TO ORAL ARGUMENT, THE COURT OF APPEALS SHALL HEAR

ORAL ARGUMENT WITHIN FIVE DAYS AFTER THE APPEAL IS DOCKETED. THE COURT OF APPEALS SHALL ENTER JUDGMENT IN THE APPEAL IMMEDIATELY AFTER THE ORAL ARGUMENT OR, IF ORAL ARGUMENT HAS BEEN WAIVED, WITHIN FIVE DAYS AFTER THE APPEAL IS DOCKETED.

NO FILING FEE SHALL BE REQUIRED OF, AND NO COURT COSTS SHALL BE ASSESSED AGAINST, AN APPELLANT WHO APPEALS UNDER THIS SECTION.

UPON MOTION OF THE APPELLANT AND FOR GOOD CAUSE SHOWN, THE COURT OF APPEALS MAY SHORTEN OR EXTEND ANY OF THE MAXIMUM TIMES SET FORTH IN THIS DIVISION. HOWEVER, IN ANY CASE, IF JUDGMENT IS NOT ENTERED WITHIN FIVE DAYS AFTER THE APPEAL IS DOCKETED, THE FAILURE TO ENTER THE JUDGMENT SHALL BE CONSIDERED TO BE A CONSTRUCTIVE ORDER OF THE COURT AUTHORIZING THE APPELLANT TO CONSENT TO THE PERFORMANCE OR INDUCEMENT OF AN ABORTION WITHOUT THE NOTIFICATION OF HER PARENT, GUARDIAN, OR CUSTODIAN, AND THE APPELLANT AND ANY OTHER PERSON MAY RELY ON THE CONSTRUCTIVE ORDER TO THE SAME EXTENT AS IF THE COURT ACTUALLY HAD ENTERED A JUDGMENT UNDER THIS SECTION AUTHORIZING THE APPELLANT TO CONSENT TO THE PERFORMANCE OR INDUCEMENT OF AN ABORTION WITHOUT SUCH NOTIFICATION.

IN THE INTEREST OF JUSTICE, THE COURT OF APPEALS, IN AN APPEAL IN ACCORDANCE WITH THIS SECTION, SHALL LIBERALLY MODIFY OR DISPENSE WITH THE FORMAL REQUIREMENTS THAT NORMALLY APPLY AS TO THE CONTENTS AND FORM OF AN APPELLANT'S BRIEF.

(B) ALL PROCEEDINGS UNDER DIVISION (A) OF THIS SECTION SHALL BE CONDUCTED IN A MANNER THAT WILL PRESERVE THE ANONYMITY OF THE APPELLANT

ON APPEAL. ALL PAPERS AND RECORDS THAT PERTAIN TO AN APPEAL UNDER THIS SECTION SHALL BE KEPT CONFIDENTIAL AND ARE NOT PUBLIC RECORDS UNDER SECTION 149.43 OF THE REVISED CODE.

2919.12 Abortion without informed consent prohibited; unmarried minors [Eff. 3-24-86]

(A) No person shall perform or induce an abortion without the informed consent of the pregnant woman.

(B) ~~If the pregnant woman is an unmarried minor, the pregnant woman's consent must be accompanied by the informed consent of one of her parents or her custodian or guardian.~~

~~(C)~~(1)(a) NO PERSON SHALL KNOWINGLY PERFORM OR INDUCE AN ABORTION UPON A WOMAN WHO IS PREGNANT, UNMARRIED, UNDER EIGHTEEN YEARS OF AGE, AND UNEMANCIPATED UNLESS AT LEAST ONE OF THE FOLLOWING APPLIES:

(i) SUBJECT TO DIVISION (B)(2) OF THIS SECTION, THE PERSON HAS GIVEN AT LEAST TWENTY-FOUR HOURS ACTUAL NOTICE, IN PERSON OR BY TELEPHONE, TO ONE OF THE WOMAN'S PARENTS, HER GUARDIAN, OR HER CUSTODIAN AS TO THE INTENTION TO PERFORM OR INDUCE THE ABORTION, PROVIDED THAT IF THE WOMAN HAS REQUESTED, IN ACCORDANCE WITH DIVISION (B)(1)(b) OF THIS SECTION, THAT NOTICE BE GIVEN TO A SPECIFIED BROTHER OR SISTER OF THE WOMAN WHO IS TWENTY-ONE YEARS OF AGE OR OLDER OR TO A SPECIFIED STEPPARENT OR GRANDPARENT OF THE WOMAN INSTEAD OF TO ONE OF HER PARENTS, HER GUARDIAN, OR HER CUSTODIAN, AND IF THE PERSON IS NOTIFIED BY A JUVENILE COURT THAT AFFIDAVITS OF THE TYPE DESCRIBED IN THAT DIVISION HAVE BEEN FILED WITH THAT COURT, THE TWENTY-FOUR HOURS ACTUAL NOTICE DESCRIBED IN THIS DIVISION AS TO

THE INTENTION TO PERFORM OR INDUCE THE ABORTION SHALL BE GIVEN, IN PERSON OR BY TELEPHONE, TO THE SPECIFIED BROTHER, SISTER, STEPPARENT, OR GRANDPARENT INSTEAD OF TO THE PARENT, GUARDIAN, OR CUSTODIAN;

(ii) ONE OF THE WOMAN'S PARENTS, HER GUARDIAN, OR HER CUSTODIAN HAS CONSENTED IN WRITING TO THE PERFORMANCE OR INDUCEMENT OF THE ABORTION;

(iii) A JUVENILE COURT PURSUANT TO SECTION 2151.85 OF THE REVISED CODE ISSUES AN ORDER AUTHORIZING THE WOMAN TO CONSENT TO THE ABORTION WITHOUT NOTIFICATION OF ONE OF HER PARENTS, HER GUARDIAN, OR HER CUSTODIAN;

(iv) A JUVENILE COURT OR A COURT OF APPEALS, BY ITS INACTION, CONSTRUCTIVELY HAS AUTHORIZED THE WOMAN TO CONSENT TO THE ABORTION WITHOUT NOTIFICATION OF ONE OF HER PARENTS, HER GUARDIAN, OR HER CUSTODIAN UNDER DIVISION (B)(1) OF SECTION 2151.85 OR DIVISION (A) OF SECTION 2505.073 OF THE REVISED CODE.

(b) IF A WOMAN WHO IS PREGNANT, UNMARRIED, UNDER EIGHTEEN YEARS OF AGE, AND UNEMANCIPATED DESIRES NOTIFICATION AS TO A PERSON'S INTENTION TO PERFORM OR INDUCE AN ABORTION ON THE WOMAN TO BE GIVEN TO A SPECIFIED BROTHER OR SISTER OF THE WOMAN WHO IS TWENTY-ONE YEARS OF AGE OR OLDER OR TO A SPECIFIED STEPPARENT OR GRANDPARENT OF THE WOMAN INSTEAD OF TO ONE OF HER PARENTS, HER GUARDIAN, OR HER CUSTODIAN, THE PERSON WHO INTENDS TO PERFORM OR INDUCE THE ABORTION SHALL NOTIFY THE SPECIFIED BROTHER, SISTER, STEPPARENT, OR GRANDPARENT INSTEAD OF THE PARENT, GUARDIAN, OR CUSTODIAN FOR PURPOSES OF DIVISION (A)(1)(a)(i) OF THIS SECTION IF ALL OF THE FOLLOWING APPLY:

(i) THE WOMAN HAS REQUESTED THE PERSON TO PROVIDE THE NOTIFICATION TO THE SPECIFIED BROTHER, SISTER, STEPPARENT, OR GRANDPARENT, CLEARLY HAS IDENTIFIED THE SPECIFIED BROTHER, SISTER, STEPPARENT, OR GRANDPARENT AND HER RELATION TO THAT PERSON, AND, IF THE SPECIFIED RELATIVE IS A BROTHER OR SISTER, HAS INDICATED THE AGE OF THE BROTHER OR SISTER;

(ii) THE WOMAN HAS EXECUTED AN AFFIDAVIT STATING THAT SHE IS IN FEAR OF PHYSICAL, SEXUAL, OR SEVERE EMOTIONAL ABUSE FROM THE PARENT, GUARDIAN, OR CUSTODIAN WHO OTHERWISE WOULD BE NOTIFIED UNDER DIVISION (B)(1)(a)(i) OF THIS SECTION, AND THAT THE FEAR IS BASED ON A PATTERN OF PHYSICAL, SEXUAL, OR SEVERE EMOTIONAL ABUSE OF HER EXHIBITED BY THAT PARENT, GUARDIAN, OR CUSTODIAN, HAS FILED THE AFFIDAVIT WITH THE JUVENILE COURT OF THE COUNTY IN WHICH THE WOMAN HAS A RESIDENCE OR LEGAL SETTLEMENT, THE JUVENILE COURT OF ANY COUNTY THAT BORDERS TO ANY EXTENT THE COUNTY IN WHICH SHE HAS A RESIDENCE OR LEGAL SETTLEMENT, OR THE JUVENILE COURT OF THE COUNTY IN WHICH THE HOSPITAL, CLINIC, OR OTHER FACILITY IN WHICH THE ABORTION WOULD BE PERFORMED OR INDUCED IS LOCATED, AND HAS GIVEN THE COURT WRITTEN NOTICE OF THE NAME AND ADDRESS OF THE PERSON WHO INTENDS TO PERFORM OR INDUCE THE ABORTION;

(iii) THE SPECIFIED BROTHER, SISTER, STEPPARENT, OR GRANDPARENT HAS EXECUTED AN AFFIDAVIT STATING THAT THE WOMAN HAS REASON TO FEAR PHYSICAL, SEXUAL, OR SEVERE EMOTIONAL ABUSE FROM THE PARENT, GUARDIAN, OR CUSTODIAN WHO OTHERWISE WOULD BE NOTIFIED UNDER DIVISION (B)(1)(a)(i) OF THIS SECTION, BASED ON A PATTERN OF PHYSICAL, SEXUAL, OR SEVERE EMOTIONAL ABUSE OF HER BY THAT PARENT, GUARDIAN, OR CUSTODIAN, AND THE WOMAN OR THE

SPECIFIED BROTHER, SISTER, STEPPARENT, OR GRANDPARENT HAS FILED THE AFFIDAVIT WITH THE JUVENILE COURT IN WHICH THE AFFIDAVIT DESCRIBED IN DIVISION (B)(1)(b)(ii) OF THIS SECTION WAS FILED;

(iv) THE JUVENILE COURT IN WHICH THE AFFIDAVIT DESCRIBED IN DIVISIONS (B)(1)(b)(ii) AND (iii) OF THIS SECTION WERE FILED HAS NOTIFIED THE PERSON THAT BOTH OF THESE AFFIDAVITS HAVE BEEN FILED WITH THE COURT.

(c) IF AN AFFIDAVIT OF THE TYPE DESCRIBED IN DIVISION (B)(1)(b)(ii) OF THIS SECTION AND AN AFFIDAVIT OF THE TYPE DESCRIBED IN DIVISION (B)(1)(b)(iii) OF THIS SECTION ARE FILED WITH A JUVENILE COURT AND THE COURT HAS BEEN PROVIDED WITH WRITTEN NOTICE OF THE NAME AND ADDRESS OF THE PERSON WHO INTENDS TO PERFORM OR INDUCE AN ABORTION UPON THE WOMAN TO WHOM THE AFFIDAVITS PERTAIN, THE COURT PROMPTLY SHALL NOTIFY THE PERSON WHO INTENDS TO PERFORM OR INDUCE THE ABORTION THAT THE AFFIDAVITS HAVE BEEN FILED. IF POSSIBLE, THE NOTICE TO THE PERSON SHALL BE GIVEN IN PERSON OR BY TELEPHONE.

(2) IF DIVISION (B)(1)(a)(ii), (iii), OR (iv) OF THIS SECTION DOES NOT APPLY, AND IF NO PARENT, GUARDIAN, OR CUSTODIAN CAN BE REACHED FOR PURPOSES OF DIVISION B(1)(a)(i) OF THIS SECTION AFTER A REASONABLE EFFORT, OR IF NOTIFICATION IS TO BE GIVEN TO A SPECIFIED BROTHER, SISTER, STEPPARENT, OR GRANDPARENT UNDER THAT DIVISION AND THE SPECIFIED BROTHER, SISTER, STEPPARENT, OR GRANDPARENT CANNOT BE REACHED FOR PURPOSES OF THAT DIVISION AFTER A REASONABLE EFFORT, NO PERSON SHALL PERFORM OR INDUCE SUCH AN ABORTION WITHOUT GIVING AT LEAST FORTY-EIGHT HOURS CONSTRUCTIVE NOTICE TO ONE OF THE WOMAN'S

PARENTS, HER GUARDIAN, OR HER CUSTODIAN, BY BOTH CERTIFIED AND ORDINARY MAIL SENT TO THE LAST KNOWN ADDRESS OF THE PARENT, GUARDIAN, OR CUSTODIAN, OR IF NOTIFICATION FOR PURPOSES OF DIVISION (B)(1)(a)(i) OF THIS SECTION IS TO BE GIVEN TO A SPECIFIED BROTHER, SISTER, STEPPARENT, OR GRANDPARENT, WITHOUT GIVING AT LEAST FORTY-EIGHT HOURS CONSTRUCTIVE NOTICE TO THAT SPECIFIED BROTHER, SISTER, STEPPARENT, OR GRANDPARENT BY BOTH CERTIFIED AND ORDINARY MAIL SENT TO THE LAST KNOWN ADDRESS OF THAT SPECIFIED BROTHER, SISTER, STEPPARENT, OR GRANDPARENT. THE FORTY-EIGHT HOUR PERIOD UNDER THIS DIVISION BEGINS WHEN THE CERTIFIED MAIL NOTICE IS MAILED. IF A PARENT, GUARDIAN, OR CUSTODIAN OF THE WOMAN, OR IF NOTIFICATION UNDER DIVISION (B)(1)(a)(i) OF THIS SECTION IS TO BE GIVEN TO A SPECIFIED BROTHER, SISTER, STEPPARENT, OR GRANDPARENT, THE SPECIFIED BROTHER, SISTER, STEPPARENT, OR GRANDPARENT, IS NOT REACHED WITHIN THE FORTY-EIGHT HOUR PERIOD, THE ABORTION MAY PROCEED EVEN IF THE CERTIFIED MAIL NOTICE IS NOT RECEIVED.

(3) IF A PARENT, GUARDIAN, CUSTODIAN, OR SPECIFIED BROTHER, SISTER, STEPPARENT, OR GRANDPARENT WHO HAS BEEN NOTIFIED IN ACCORDANCE WITH DIVISION (B)(1) OR (2) OF THIS SECTION CLEARLY AND UNEQUIVOCALLY EXPRESSES THAT HE OR SHE DOES NOT WISH TO CONSULT WITH A PREGNANT WOMAN PRIOR TO HER ABORTION, THEN THE ABORTION MAY PROCEED WITHOUT ANY FURTHER WAITING PERIOD.

(4) FOR PURPOSES OF PROSECUTIONS FOR A VIOLATION OF DIVISION (B)(1) OR (2) OF THIS SECTION, IT SHALL BE A REBUTTABLE PRESUMPTION THAT A WOMAN WHO IS UNMARRIED AND UNDER EIGHTEEN YEARS OF AGE IS UNEMANCIPATED.

(C)(1) IT IS AN AFFIRMATIVE DEFENSE TO A CHARGE UNDER DIVISION (B)(1) OR (2) OF THIS SECTION THAT THE PREGNANT WOMAN PROVIDED THE PERSON WHO PERFORMED OR INDUCED THE ABORTION WITH FALSE, MISLEADING, OR INCORRECT INFORMATION ABOUT HER AGE, MARITAL STATUS, OR EMANCIPATION, ABOUT THE AGE OF A BROTHER OR SISTER TO WHOM SHE REQUESTED NOTICE BE GIVEN AS A SPECIFIED RELATIVE INSTEAD OF TO ONE OF HER PARENTS, HER GUARDIAN, OR HER CUSTODIAN, OR ABOUT THE LAST KNOWN ADDRESS OF EITHER OF HER PARENTS, HER GUARDIAN, HER CUSTODIAN, OR A SPECIFIED BROTHER, SISTER, STEPPARENT, OR GRANDPARENT TO WHOM SHE REQUESTED NOTICE BE GIVEN AND THE PERSON WHO PERFORMED OR INDUCED THE ABORTION DID NOT OTHERWISE HAVE REASONABLE CAUSE TO BELIEVE THE PREGNANT WOMAN WAS UNDER EIGHTEEN YEARS OF AGE, UNMARRIED, OR UNEMANCIPATED, TO BELIEVE THAT THE AGE OF A BROTHER OR SISTER TO WHOM SHE REQUESTED NOTICE BE GIVEN AS A SPECIFIED RELATIVE INSTEAD OF TO ONE OF HER PARENTS, HER GUARDIAN, OR HER CUSTODIAN WAS NOT TWENTY-ONE YEARS OF AGE, OR TO BELIEVE THAT THE LAST KNOWN ADDRESS OF EITHER OF HER PARENTS, HER GUARDIAN, HER CUSTODIAN, OR A SPECIFIED BROTHER, SISTER, STEPPARENT, OR GRANDPARENT TO WHOM SHE REQUESTED NOTICE BE GIVEN WAS INCORRECT.

(2) IT IS AN AFFIRMATIVE DEFENSE TO A CHARGE UNDER THIS SECTION THAT COMPLIANCE WITH THE REQUIREMENTS OF THIS SECTION WAS NOT POSSIBLE BECAUSE AN IMMEDIATE THREAT OF SERIOUS RISK TO THE LIFE OR PHYSICAL HEALTH OF THE PREGNANT WOMAN FROM THE CONTINUATION OF HER PREGNANCY CREATED AN EMERGENCY NECESSITATING THE IMMEDIATE PERFORMANCE OR INDUCEMENT OF AN ABORTION.

(D) Whoever violates this section is guilty of ~~consensual~~ UNLAWFUL abortion, a misdemeanor of the first degree ~~and for subsequent offenses.~~ IF THE OFFENDER PREVIOUSLY HAS BEEN CONVICTED OF OR PLEADED GUILTY TO A VIOLATION OF THIS SECTION, UNLAWFUL ABORTION IS a felony of the fourth degree.

(E) WHOEVER VIOLATES THIS SECTION is liable to the pregnant woman AND HER PARENTS, GUARDIAN, OR CUSTODIAN for civil compensatory and exemplary damages.

(F) AS USED IN THIS SECTION "UNEMANCIPATED" MEANS THAT A WOMAN WHO IS UNMARRIED AND UNDER EIGHTEEN YEARS OF AGE HAS NOT ENTERED THE ARMED SERVICES OF THE UNITED STATES, HAS NOT BECOME EMPLOYED AND SELF-SUBSISTING, OR HAS NOT OTHERWISE BECOME INDEPENDENT FROM THE CARE AND CONTROL OF HER PARENT, GUARDIAN, OR CUSTODIAN.

4731.22 Grounds for refusal to grant and revocation of certificate; hearing and investigation; report [Eff. 3-24-86]

(A) The state medical board, by a vote of not less than six of its members, may revoke or may refuse to grant a certificate to a person found by the board to have committed fraud in passing the examination or to have committed fraud, misrepresentation, or deception in applying for or securing any license or certificate issued by the board.

(B) The board, by a vote of not less than six members, shall, to the extent permitted by law, limit, revoke, or suspend a certificate, refuse to register or refuse to reinstate an applicant, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:

(1) Permitting one's name or one's certificate of registration to be used by a person, group, or corporation when the individual concerned is not actually directing the treatment given;

(2) Failure to use reasonable care discrimination in the administration of drugs, or failure to employ acceptable scientific methods in the selection of drugs or other modalities for treatment of disease;

(3) Selling, prescribing, giving away, or administering drugs for other than legal and legitimate therapeutic purposes or conviction of violation of any federal or state law regulating the possession, distribution, or use of any drug;

(4) Willfully betraying a professional confidence or engaging in the division of fees for referral of patients, or the receiving of a thing of value in return for a specific referral of a patient to utilize a particular service or business;

(5) Soliciting patients or publishing a false, fraudulent, deceptive, or misleading statement.

As used in this division, "false, fraudulent, deceptive, or misleading statement" means a statement that includes a misrepresentation of fact, is likely to mislead or deceive because of a failure to disclose material facts, is intended or is likely to create false or unjustified expectations of favorable results, or includes representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

(6) A departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established;

(7) Representing, with the purpose of obtaining compensation or other advantage for himself or for any other person, that an incurable disease or injury, or other incurable condition, can be permanently cured;

(8) The obtaining of, or attempting to obtain, money or anything of value by fraudulent misrepresentations in the course of practice;

(9) Conviction of a felony whether or not committed in the course of his practice;

(10) Conviction of a misdemeanor committed in the course of his practice;

(11) Violation of the conditions of limitation placed by the board upon a certificate to practice or violation of the conditions of limitation upon which a limited or temporary registration or certificate to practice is issued;

(12) Failure to pay license renewal fees specified in the chapter;

(13) Any division of fees or charges, or any agreement or arrangement to share fees or charges, made by any person licensed to practice medicine or surgery, osteopathic medicine and surgery, or podiatric medicine and surgery with any other person so licensed, or with any other person;

(14) The violation of any provision of a code of ethics of a national professional organization as specified in this division. "National professional organization" means the American medical association, the American osteopathic association, the American podiatry association, and such other national professional organizations as are determined, by rule, by the state medical board. The state medical board shall obtain and keep on file current copies of the codes of ethics of the various national professional organizations. The practitioner whose certificate is being suspended or revoked shall not be found to have violated

any provision of a code of ethics of any organization not appropriate to his profession.

(15) Inability to practice according to acceptable and prevailing standards of care by reason of illness, excessive use of alcohol, excessive use of controlled substances, drugs, or chemicals, or as result of a mental or physical condition. In enforcing this division, the board upon a showing of a possible violation, may compel any individual licensed or certified to practice by this chapter or who has applied for licensure or certification pursuant to this chapter to submit to a mental or physical examination, or both, as required by and at the expense of the board. Failure of any individual to submit to a mental or physical examination when directed constitutes an admission of the allegations against him unless the failure is due to circumstances beyond his control, and a default and final order may be entered without the taking of testimony or presentation of evidence. If the board finds a physician unable to practice because of the reasons set forth in this division, the board shall require such physician to submit to care, counselling, or treatment by physicians approved or designated by the board, as a condition for initial, continued, reinstated, or renewed licensure to practice. An individual licensed by this chapter affected under this section shall be afforded an opportunity to demonstrate to the board that he can resume his practice in compliance with acceptable and prevailing standards under the provisions of his certificate. For the purpose of this section, any individual licensed or certified to practice by this chapter accepts the privilege of practicing in this state, and by so doing or by the making and filing of a registration or application to practice in this state, shall be deemed to have given his consent to submit to a mental or physical examination when directed to do so in writing by the board, and to have waived all objections to the admissibility of testimony or examination reports that constitute a privileged communication.

(16) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or

conspiring to violate, any provisions of this chapter or any rule promulgated by the board;

(17) The violation of any abortion rule adopted by the public health council pursuant to section 3701.341 of the Revised Code;

(18) The revocation or suspension by another state of a license or certificate to practice issued by the proper licensing authority of that state for an action that would also have been a violation of this chapter except for nonpayment of fees;

(19) THE VIOLATION OF SECTION 2919.12 OF THE REVISED CODE.

(C) Whenever any person holding a valid certificate issued pursuant to Chapter 4731 of the Revised Code, pleads guilty to or is convicted of a violation of Chapter 2907, 2925, or 3719 of the Revised Code or of any substantively comparable ordinance of a municipal corporation in connection with his practice, the prosecutor in the case shall, on forms prescribed and furnished by the state medical board, promptly notify the board of the conviction. As used in this division, "prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

Within thirty days of receipt of such information, the board shall conduct a hearing in accordance with Chapter 119 of the Revised Code to determine whether to suspend or revoke any certificate issued pursuant to Chapter 4731 of the Revised Code.

(D)(1) The board shall investigate evidence which appears to show that any person has violated any provision of this chapter, Chapter 4730 of the Revised Code, or rule of the board. For the purpose of investigation on matters concerning a possible violation of division (B)(3), (8), (9), (10), or (11) of this section, the board may administer oaths, order taking of depositions, issue subpoenas, compel the attendance of witnesses and the production of books,

accounts, papers, records, documents, and testimony. The hearings and investigations of the board shall be considered civil actions for purposes of section 2305.251 of the Revised Code. In case of disobedience of any person with respect to an order or subpoena issued by the board, or on the refusal of a witness to testify to any matter regarding which he may be lawfully interrogated, a judge of the court of common pleas of the county in which the person resides, on application of the board, may compel obedience by attachment proceedings as for contempt, as in the case of disobedience with respect to the requirements of a subpoena issued from such court or a refusal to testify in such court. Each officer who serves such subpoena shall receive the same fees as a sheriff, and each witness who appears, in obedience to a subpoena, before the board, shall receive the fees and mileage provided for witnesses in civil cases in courts of common pleas. Any person may report to the board under oath any information ~~such~~ THAT THE person may have ~~appearing~~ THAT APPEARS to show a violation of any provision of this chapter, Chapter 4730 of the Revised Code, or rule of the board. In the absence of bad faith, any person who reports such information or who testifies before the board in any adjudication hearing conducted under Chapter 119 of the Revised Code shall not be liable for civil damages as a result thereof.

Each complaint or allegation of a violation received by the board shall be assigned a case number and shall be recorded by the board. Investigations of alleged violations of this chapter, Chapter 4730 of the Revised Code, or any rule of the board shall be supervised by a board member selected on a rotating basis by the board. No member of the board who supervises the investigation of a case shall participate in further adjudication of the case.

The board shall conduct all investigations and proceedings in such a manner as to protect patient confidentiality. The board shall obtain the consent of the patient in the form of a written release signed by the patient or by an authorized representative of the patient before

seeking access to medical record information concerning a patient for the purpose of any investigation or hearing, except that no such consent is required if there is reason to believe that there has been a violation of division (B)(3) of section 4731.22 of the Revised Code. The board shall not make public names or other identifying information about patients unless proper consent is given or a waiver of the patient privilege exists under division (B) of section 2317.02 of the Revised Code, except that no such consent or waiver is required if the board possesses reliable and substantial evidence that no bona fide physician-patient relationship exists.

(2) If any individual licensed or certified to practice or any association or society of individuals licensed or certified under this chapter believes that a violation of any provision of this chapter, or Chapter 4730 of the Revised Code has occurred, he shall report to the board the information upon which the belief is based. Any person or society who reports under this division and provides such information in good faith shall not be subject to suit for civil damages as a result thereof.

(3) In absence of fraud or bad faith, neither the board nor any member, agent, representative, or employee thereof shall be held liable in damages to any person by reason of investigating or acting upon information presented to it pursuant to this chapter.

(4) On a quarterly basis the board shall prepare a report that documents the disposition of all cases during the preceding three months. The report shall contain the following information for each case with which the board has completed its activities:

(a) The case number assigned for the complaint or alleged violation pursuant to division (D)(1) of section 4731.22 of the Revised Code;

(b) The type of license or certificate to practice, if any, held by the individual against whom the complaint is directed;

(c) A description of the allegations contained in the complaint;

(d) The disposition of the case.

The report shall state how may cases are still pending, and shall be prepared in such a manner as to protect the identity of each person involved in each case. The report shall be a public record under section 149.43 of the Revised Code.

(E) Irrespective of administrative remedies, the board may petition a court of common pleas for a temporary restraining order to suspend a physician's license. The court shall issue such an order if the board demonstrates that immediate or irreparable injury or loss to the public would result from the physician's continued practice of medicine.

(F) Any action taken by the board under division (B) of this section resulting in a suspension from practice shall be accompanied by a written statement of the conditions under which the certificate holder may be reinstated to practice. The board shall adopt rules governing conditions to be imposed for reinstatement. Reinstatement of a certificate suspended pursuant to division (B) of this section or surrendered to the board by its holder requires an affirmative vote of not less than six members of the board.

SECTION 2. That existing sections 149.43, 2305.11, 2919.12, and 4731.22 of the Revised Code are hereby repealed.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Akron Center for Reproductive Health, et al. *Plaintiffs*	)	
	)	Civil Action
vs.	)	
	)	Number C 86-1099 A
Lynn Slaby, etc., et al. *Defendants*	)	ORDER

The court has filed its memorandum and order finding that H.B. 319 violates the due process clause of the fourteenth amendment to the Constitution. Therefore,

IT IS ORDERED that defendants Slaby and Rosen are hereby permanently enjoined from enforcing the statute.

IT IS FURTHER ORDERED that defendants Celeste and Celebrezze are hereby dismissed.

IT IS FURTHER ORDERED that plaintiff, Patty Poe, is hereby dismissed as a plaintiff.

ANN ALDRICH, U.S. DISTRICT JUDGE

Memorandum and Order of the United States District Court,
Northern District of Ohio, Eastern Division
(Reported at 633 F.Supp. 1123)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

Civil Action No. C86-1099A

Filed April 22, 1986

* * *

AKRON CENTER FOR REPRODUCTIVE HEALTH, et al.
Plaintiffs

v.

GARY M. ROSEN, as Police Prosecutor for the City of Akron and as representing all other police prosecutors in Ohio, et al.
Defendants

* * *

MEMORANDUM AND ORDER

ALDRICH, J.

This action was filed on March 21, 1986 by plaintiffs challenging the constitutionality of Amended Substitute House Bill Number 319 ("H.B. 319"), which requires that a physician who intends to induce an abortion on an unmarried, unemancipated woman under the age of eighteen must notify her parents, unless one of several exceptions, including a waiver by a juvenile court, is present. The complaint seeks a declaratory judgment that H.B. 319 is unconstitutional on its face, and prays for injunctive relief against its enforcement.

On March 31, 1986, this Court granted plaintiffs' motion for a ten-day temporary restraining order, which was extended for an additional ten days for good cause shown until April 20, 1986. Extensive briefs have been filed, and by agreement of all the parties, a consolidated hearing on the preliminary injunction and on the merits pursuant to Fed. R. Civ. P. 65(b)(2) was held on April 21, 1986, at which argument was heard.

For the reasons set forth below, the Court holds that H.B. 319 violates the due process clause of the fourteenth amendment to the Constitution and that defendants Rosen and Slaby are enjoined from enforcing it. No motions for class certifications having been pursued, no classes are certified. Defendants Celeste and Celebrezze are dismissed, as is plaintiff Poe. The following opinion contains findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a).

Jurisdiction is proper pursuant to 28 U.S.C. §§1331, 1343(a)(3) and (4) (1982). Declaratory judgment relief is authorized by 28 U.S.C. §§2201 and 2202 (1982).

FINDINGS OF FACT

I.

A. H.B. 319

H.B. 319 was passed on November 20, 1985, and became law without the governor's signature. The act was to become effective on March 24, 1986. Ohio Rev. Code Ann. §2919.12 (Page Supp. 1985) ("§2919.12") provides that "[n]o person shall knowingly perform or induce an abortion upon a woman who is pregnant, unmarried, under eighteen years of age, and unemancipated" unless one of five exceptions applies. Subsection (B)(1)(a) provides that an abortion can proceed after the physician has given twenty-four hours actual notice of the pending abortion to one of the minor woman's parents,

guardian or custodian.[1] In certain cases where the minor woman fears physical, sexual or severe emotional abuse if her parents are notified, a specified relative can be notified instead of her parents upon the filing with a juvenile court of affidavits by the minor and her relative. §2919.12(B)(1)(b). Notification is not required if one of the woman's parents has consented in writing to the performance of the abortion. §2919.12(B)(1)(a)(ii). If a parent cannot be reached for actual notification after reasonable effort, constructive notice by ordinary and certified mail forty-eight hours before a procedure is performed is adequate. §2919.12(c)(2).

A minor who objects to notification may file an action in juvenile court for the waiver of notification. Ohio Rev. Code Ann. §2151.85 (Page Supp. 1985) ("§2151.85"). She begins the action by filing a complaint containing one or both of the following allegations: 1) that she is mature enough to decide to have an abortion without parental notification; 2) that one or both of her parents has engaged in a pattern of physical, sexual, or emotional abuse against her or that notification is otherwise not in her best interests. §2151.85(A)(4). The court is then required to appoint counsel for the complainant, hear the case within five business days, and immediately decide the case at the end of the hearing. §2151.85(B)(1), (B)(2), and (C). If the court finds against the minor and dismisses the complaint, it must immediately notify the woman of her right to appeal the decision under Ohio Rev. Code Ann. §2505.073 (Page Supp. 1985) ("§2505.073").

A physician is not required to notify a minor's parents before performing an abortion if a waiver is authorized by the court. §2919.12(B)(1)(iii). The doctor may also proceed without notification after five days have elapsed from the docketing of the complaint before the juvenile or the appellate court, without a judgment entry by that court. §2919.12(B)(1)(iv).

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[1] Hereinafter, the Court will use the word "parent" to refer to any person the physician is permitted by law to notify under H.B. 319 in order to avoid liability.

A physician who violates §2919.12 is guilty of a misdemeanor of the first degree for his or her first offense, and of a felony of the fourth degree if he or she has previously been convicted or pleaded guilty to a violation of this section. §2919.12(D). The physician may also be liable for civil compensatory and punitive damages to the minor and her parents. §2919.12(E). Finally, a doctor violating §2919.12 may have his or her certificate to practice medicine limited, revoked or suspended, or may be subject to reprimand and probation. Ohio Rev. Code Ann. §4731.22 (Page Supp. 1985) ("§4731.22"). However, the physician can assert the affirmative defenses that he or she was misled regarding the age, marital status, or emancipation of the child, or that the notification was impossible because of an immediate threat of serious risk to the minor's life or physical health by an emergency requiring the immediate performance of an abortion. §2919.12(C).

B. The Parties

Plaintiff The Akron Center for Reproductive Health ("Akron Center") operates a free-standing medical facility in Summit County, Ohio, offering birth control, pregnancy and abortion services to patients including unmarried, unemancipated women under the age of eighteen. The Akron Center alleges that it, its agents or its employees could be subjected to civil and criminal liability under H.B. 319.

Plaintiff Max Pierre Gaujean, M.D., is a physician who performs abortions at the Akron Center. He alleges that he will be subjected by H.B. 319 to criminal and civil penalties and possible impairment of his ability to practice medicine in the state of Ohio. Both Dr. Gaujean and the Akron Center sue on behalf of their minor patients as well as on their own behalf.

Plaintiff Patty Poe is an unmarried minor living with her parents in Summit County who is sexually active and believes that she may be pregnant. She alleges that she is mature and that notification to her parents of her pregnancy would cause her emotional harm and force her to continue her pregnancy.

Plaintiff Rachel Roe is an unmarried minor living in the home of one of her parents with her two-year old child. She alleges that she is mature and that she has been subjected to physical abuse in her home. Roe has been refused an abortion at the Akron Center because of the imminent operation of H.B. 319.

Defendant Gary M. Rosen is the City Prosecutor for the City of Akron, Ohio. Defendant Lynn Slaby is the Prosecuting Attorney of Summit County, Ohio. Plaintiffs allege that Rosen is responsible for prosecuting misdemea..ors and Slaby for prosecuting felonies arising under §2912.12. Defendant Anthony Celebrezze is the Attorney General of the state of Ohio, and defendant Richard F. Celeste is the Ohio governor. All defendants are sued in their official capacities. Plaintiffs also sue Rosen and Slaby as representatives of all Ohio prosecutors charged with prosecuting violations of §2912.12, and plaintiffs Poe and Roe also seek to represent the entire class of unmarried, unemancipated minor women in Ohio who are or may become pregnant. However, plaintiffs have not filed a motion to certify either plaintiff or defendant classes.

CONCLUSIONS OF LAW

II.

A. Standing of the Plaintiffs

Present case law indisputably supports the standing of the Akron Center and Dr. Gaujean to assert the due process rights of their patients. *Birth Control Centers, Inc. v. Reizen,* 743 F.2d 352, 358 (6th Cir. 1984); *American College of Obstetricians and Gynecologists v. Thornburgh,* 737 F.2d 283, 290 n. 6, (3d Cir. 1984), *prob. juris. noted,* 105 S.Ct. 2015 (1985) ("*ACOG*"), and cases cited therein. It is also indisputable that the Akron Center and Dr. Gaujean have standing to assert their own interests. *E.g., Singleton v. Wulff,* 428 U.S. 106 (1976); *City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416 (1983). Rachel Roe's

standing is obvious and has not been challenged by the defendants.

Defendants Celeste and Celebrezze, however, argue that Patty Poe is not a proper plaintiff in this case because she does not state a claim.[2] Poe's affidavit states that she is currently sexually active and that she is "uncertain as to whether or not I am pregnant as of this date, but in the event that I am found to be pregnant, I would wish to terminate the pregnancy. . . ." In *Roe v. Wade,* 410 U.S. 705, 714-715 (1973), the Court held that a similar claim by a married couple in which the woman was not pregnant was too speculative to permit standing as plaintiffs to the litigation. Accordingly, Patty Poe is dismissed as a plaintiff from this action.[3]

B. Prosecutors' Motions to Dismiss

Defendants Rosen and Slaby both have filed motions to dismiss them as parties to this action, claiming that the duty to defend the constitutionality of state statutes falls upon the attorney general. While they are correct that the attorney general is required by statute to appear "[w]hen required by the governor or the general assembly . . . in a cause in which the state is a party, or in which the state is directly interested . . .," Ohio Rev. Code Ann. §109.02 (Page 1984), Rosen and Slaby wrongly argue that they have no role in this action.

Rosen's duties as City Prosecutor for the City of Akron are defined by Ohio Rev. Code Ann. §1901.34(A) (Page 1983):

> The village solicitor, city director of law, or similar chief legal officer for each municipal corporation

[2] Defendants Celeste and Celebrezze will hereinafter be referred to as "the state" and as "defendants" unless the Court expressly alludes to Rosen and Slaby, because only Celeste and Celebrezze submitted a brief on the merits of this action.

[3] Even if Rachel Roe's pregnancy is terminated before the end of this litigation, however, she will continue to have standing under the "capable of repetition, yet evading review" standard. Roe, 410 U.S. at 713.

> within the territory of a municipal court shall prosecute all criminal cases brought before the municipal court . . . for violation of state statutes or other criminal offenses occurring within the municipal corporation. . .

Since plaintiffs' activities which could produce liability under §2919.12 occur in Akron, Rosen would be a prosecutor charged with enforcement of the statute against them.

Slaby's duties as a County Prosecutor in Summit County, the county in which Akron lies, are defined by Ohio Rev. Code Ann. §309.08 (Page 1979):

> The prosecuting attorney may inquire into the commission of crimes within the county and shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, and such other suits, matters, and controversies as he is required to prosecute within or outside the county . . .

Thus, Slaby also has statutory authority to prosecute the Akron Center and Dr. Gaujean for violations of §2919.12. Moreover, Slaby would be statutorily required to prosecute actions to discipline Dr. Gaujean under §4731.22 if requested by the secretary of the state medical board. Ohio Rev. Code Ann. §4731.39 (Page 1977).

Accordingly, both Rosen and Slaby are proper parties to bear the injunctive relief requested by the plaintiffs. While they may understandably expect that the state will bear the costs of defending this litigation, they cannot be dismissed as defendants. *See Chernin v. Wechans,* No. C85-109 (N.D. Ohio March 31, 1986).

C. State's Motion to Dismiss

The state defendants, Governor Celeste and Attorney General Celebrezze, argue that their participation in this suit is barred by the eleventh amendment. The eleventh amendment bars actions in a federal court by a citizen against

his or her own state. *Hans v. Louisiana,* 134 U.S. 1 (1890). An action against a state official in his or her official capacity is in fact an action against the state. *Kentucky v. Graham,* ___ U.S. ___, 105 S.Ct. 3099 (1985). However, the doctrine of *Ex parte Young,* 209 U.S. 123 (1908), strips state officials of their eleventh amendment immunity in their official capacity when the official attempts to enforce an unconstitutional state law. Whether these defendants are proper parties to this action depends upon whether they have "some connection" with H.B. 319's enforcement. *Young,* 209 U.S. at 157.

Plaintiffs conceded in argument that they rely solely upon the Ohio constitution's delegation of "overall responsibility for the execution of the laws of the State" to the governor for Celeste's connection with H.B. 319. They assert that the Attorney General's connection with H.B. 319 is his general duty as advisor to the prosecuting attorneys of the counties and to state officials and agencies, such as the Medical Board. Relying upon *Allied Artists Pictures Corp. v. Rhodes,* 473 F. Supp. 560 (S.D. Ohio 1979), *on reexamination,* 496 F. Supp. 408 (1980), *modified on other grounds,* 697 F.2d 656 (6th Cir. 1982), plaintiffs contend that these general law enforcement duties constitute a sufficient "connection" to pierce the eleventh amendment.

Plaintiffs' reliance on *Allied Artist Pictures* is misplaced. Although the court in that case retained jurisdiction over the governor of Ohio under the execution clause of the Ohio Constitution, it relied upon cases holding "a sufficient likelihood that the connection be brought to bear against a plaintiff's interest exists where a state enacts regulatory legislation creating rights and relationships of substantial public interest not readily protectible in litigation between private parties." 496 F. Supp. at 425. However, *Allied* did not disagree with the general proposition that "[t]he mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute." *Id.* at 426 (quoting *Shell Oil Co. v. Noel,* 608 F.2d 208, 211 (1st Cir. 1979)). The Sixth Circuit affirmed the *Allied* district court's propriety in keeping the governor as a party, stating:

> Even in the absence of specific state enforcement provisions, the substantial public interest in enforcing the trade practices legislation involved here places a significant obligation upon the Governor to use his general authority to see that state laws are enforced, see Ohio Constit. Art. III, §6; Ohio Rev. Code Ann. §2733.02 (Page 1981) (concerning equitable actions against corporations violating state laws). We thus find that the Governor has sufficient connection with the enforcement of the Act that he falls outside the scope of eleventh amendment protection and may be sued for the declaratory and injunctive relief requested here. Were this action unavailable to the plaintiffs, they would be unable to vindicate the alleged infringement of their constitutional rights without first violating an Ohio statute requiring a significant change in their business conduct. Such a result is clearly what the doctrine in *Ex Parte Young* was in part designated to avoid.

679 F.2d at 666 n. 5. The case before this Court is one where enforcement of the challenged statute is clearly delegated to the prosecuting attorneys of the state. Moreover, unlike trade practices legislation, H.B. 319 is primarily a criminal statute — an area of the law generally enforced by local prosecutors rather than state officials. Most importantly, plaintiffs are not in a position where they cannot bring suit for lack of a proper defendant to enjoin, as the Court has already concluded that prosecutors Rosen and Slaby are proper parties.

That the state is not responsible as a party in all suits challenging the constitutionality of state law is clear from 28 U.S.C. §2403(b) (1982) ("§2403(b)") and Ohio Rev. Code Ann. §2721.12 (Page 1981), which require that the attorney general must be notified of a constitutional challenge to a state statute and permitted to participate in the litigation. Since these statutes demonstrate that state participation is not mandatory, it follows that Celeste and Celebrezze need not be parties, absent a connection to the enforcement of

the statute. Since the Court has found that the requisite connection does not exist, Celeste and Celebrezze will be dismissed from this action as defendants.

The Court will view the filing of this action against the state officials as certification required under §2403(b). It will consider the Attorney General's participation in this litigation as that permitted by §2403(b).

III.

The principles governing the constitutionality of the states' regulation of abortions have been clearly set forth by the Supreme Court of the United States and undisputably bind this Court. In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court concluded that the constitutional right to privacy encompasses the abortion decision reached by a pregnant woman in consultation with her doctor. However, the Court stated that this right is not absolute; state regulation is permissible to foster "compelling state interests" by "narrowly drawn" legislation. *Id.* at 155. The Court held as a matter of law that the point at which the states' interest in protecting the health of pregnant women becomes "compelling" is approximately at the end of the first trimester of pregnancy. *Id.* at 163. It also concluded that the states' interest in protecting "potential life" becomes compelling at "viability," or when a fetus is "potentially able to live outside the mother's womb." *Id.* at 160, 163. Thus, during the first trimester of pregnancy, a woman and her physician may decide to abort a fetus free of state regulation. *Id.* at 163. Beginning at approximately the end of the first trimester, states may regulate abortion procedures to foster maternal health. *Id.* at 164. Subsequent to viability, states can regulate or proscribe abortion, except when an abortion is necessary to preserve the life or health of the mother. *Id.*

However, the Court has recognized that states have broader authority to regulate the abortion decisions of minor women than of adult women. While holding that permitting parents to exercise "an absolute, and possibly arbitrary, veto"

over the abortion decisions of their minor children is unconstitutional, the Court emphasized that it did not decide that every minor could give effective consent to obtain an abortion. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74-75 (1976). The Court later elaborated:

> We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Bellotti v. Baird, 443 U.S. 622, 634 (1979) (*Bellotti II*) (plurality opinion). For these reasons, states may determine that regulation requiring parental consultation by minors seeking abortions is desirable. *Id.* at 640. However, "[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a state to act with particular sensitivity when it legislates to foster parental involvement in this matter." *Id.* at 642.

The *Bellotti II* plurality indicated that states cannot require parental consent for minors to obtain abortions without also providing an alternative procedure for authorization of these abortions. *Id.* at 643. Justice Powell described the constitutionally required "waiver proceeding":

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient

> expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in *Danforth*.

Id. at 643-644 (footnote and citation omitted).[4] However, the Constitution is not violated by statutes requiring parental notice to the parents of immature dependent minors seeking abortions. *H.L. v. Matheson*, 450 U.S. 398, 409 (1981).

With these principles in mind, this Court considers the plaintiffs' contentions that H.B. 319 violates due process.

IV.

A. Constitutional Requirement of a Waiver Procedure

The state initially argues that review of the waiver procedure established in §2151.85 is unnecessary, for an alternative procedure to parental notification is not constitutionally required. The state relies on Justice O'Connor's statement in her *Akron* dissent that "no decision of this Court has yet held that parental notification in the case of mature minors is unconstitutional." 462 U.S. at 469 n. 12. After noting that "at least four members of the current Supreme Court do not subscribe to Justice Powell's view [that the waiver procedure described in *Bellotti II* is constitutionally mandated for mature minors seeking to avoid parental notice]," defendants Celeste and Celebrezze's Motion to Dismiss at 29, the state laments that Justices Powell and Stewart have "unfortunately lumped parental consent and consultation together . . . ." *Id.* at 30. It concludes that the requirements of parental notice and parental consent

[4] Although this plurality opinion was joined by four justices, rejected by four justices concurring in the judgment, and the remaining justice dissented from the judgment, the plurality opinion delivered by Justice Powell is controlling precedent. *See Akron*, 462 U.S. at 439.

are distinguishable because only the latter constitutes an absolute veto over minors' decisions; therefore, waiver procedures are unnecessary for parental notice statutes.

The state's argument is inconsistent with explicit statements of a majority of the Supreme Court and the holdings of all courts examining notice statutes since the *Akron* decision in 1983. Although *Matheson* did not hold that the parental notification statute which the Court reviewed was unconstitutional, it expressly limited its holding to the parameters of "the constitutional rights of an immature, dependent minor." 450 U.S. at 409. In his *Matheson* concurrence, Justice Powell, joined by Justice Stewart, clarified:

> I join the opinion of the Court on the understanding that it leaves open the question whether [the notification statute] unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification. I write to make clear that I continue to entertain the views on this question stated in my opinion in *Bellotti II*.

Id. at 414 (citations omitted). Although no parental notification statute was before the Court in *Akron*, 462 U.S. at 439 n. 29, the majority opinion of the Court delivered by Justice Powell clearly stated that "a requirement [of parental notice] . . . in the case of a mature minor seeking an abortion would be unconstitutional. *See H.L. v. Matheson*, 450 U.S., at 420 (POWELL, J., concurring); *id.*, at 428, n. 3 (MARSHALL, J., dissenting)." 462 U.S. at 441 n. 31. *See also id.* at 428 n. 10 ("A majority of the Court, however, has indicated that these state and parental interests must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement.").

The Seventh Circuit has unequivocally rejected the argument that a waiver procedure is not constitutionally required as an alternative to parental notification. After citing

the Supreme Court's statements on notification statutes in *Akron*, the court continued:

> In requiring that states provide bypass procedures in connection with both consent and notification statutes, the Court has made no suggestion that procedures insufficient for consent statutes would be sufficient for notification statutes. Rather than differentiating between consent and notification statutes, the Court in *City of Akron* stated that it is "parental involvement" that an emancipated or mature minor must have an opportunity to avoid. 103 S.Ct. 15 2491 n. 10. The apparent reasons for the similar treatment of notification and consent requirements is that, as a practical matter, a notification requirement will have the same deterrent effect on a minor seeking an abortion as a consent statute has. *See H.L. v. Matheson,* 450 U.S. at 420 & n. 9 (concurring opinion of Powell, J.) (stating that the rationale for requiring a state to provide a judicial bypass to a consent requirement is applicable to notification statutes).
>
> * * *
>
> Although notification requirements do not give parents the legal power to veto their daughter's abortion decision, as a practical matter they may. "[Y]oung pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court." *Bellotti II,* 443 U.S. at 647 (plurality opinion of Powell, J.). It was a recognition of this vulnerability that led the plurality in *Bellotti II* to state that confidentiality was necessary in a waiver-of-consent proceeding. *See id.*
>
> Because parental involvement brought about by either consent or notification statutes may result in similar efforts by parents to block the abortion,

> we will apply the Supreme Court's analysis with respect to consent bypass procedures in our consideration of the constitutional sufficiency of Indiana's notification bypass procedures.

Indiana Planned Parenthood Affiliates Association, Inc. v. Pearson, 716 F.2d 1127, 1132 (7th Cir. 1983). *Accord Zbaraz v. Hartigan,* 763 F.2d 1532, 1539 (7th Cir.), *appeal pending,* 54 U.S.L.W. 3311 (U.S. Oct. 16, 1985) (No. 85-673); *Glick v. McKay,* 616 F.Supp. 322, 325 (D. Nev. 1985); *Orr v. Knowles,* No. CV 81-0-301 (D. Neb. 1983).

The state cites no case holding that waiver proceedings are dispensable in parental notification statutes. Indeed, the practice of states such as Ohio which include waiver proceedings in their notification statutes suggests that these states recognize that this procedure is constitutionally required. Moreover, even if this Court could accept the state's argument that the opinions of Justice O'Connor and three other justices are relevant to this issue, the state would still fail to demonstrate that a majority of the justices favor its position. In fact, Justice Burger, who delivered the opinion of the Court in *Matheson,* joined the majority in *Akron,* indicating that he concurs in Justice Powell's opinion on the necessity of alternative procedures. Finally, the practical equivalency for dependent minor women of consent and notification statutes requires that this Court eschew the distinction that the state attempts to draw. Therefore, the Court will analyze the constitutional sufficiency of §2151.85 under the standards set forth in *Bellotti II.*

B. Vagueness

Plaintiffs contend that many provisions of H.B. 319 are unconstitutionally vague, citing such language as the physician's "reasonable effort" to notify a minor's parents, §2919.12(B)(2), and "reasonable cause to believe" a minor's representations, §2919.12(C)(1). They also argue that the scienter requirement for imposition of criminal penalties upon physicians is unclear and that the statute's "constructive authorization" provisions leave physicians unclear as to when they can proceed without liability.

The parties agree upon the standard to be applied when evaluating the alleged vagueness of H.B. 319.

> It is settled that, as a matter of due process, a criminal statute that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States v. Harriss,* 347 U.S. 612, 617 (l954), or is so indefinite that "it encourages arbitrary and erratic arrests and convictions," *Papachristou v. Jacksonville,* 405 U.S. 156, 162 (l972), is void for vagueness.

Colautti v. Franklin, 439 U.S. 379, 390 (l979). Federal court abstention from the construction of an ambiguous state statute may be appropriate if the constitutional question cannot be framed in the absence of an authoritative construction. *Bellotti v. Baird,* 428 U.S. 132, 148 (l976) ("*Bellotti I*"). However, federal courts should construe a statute so as to avoid unconstitutionality when such a construction is fair, obviating the need for abstention. *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft,* 462 U.S. 476, 493, 494 n. 21 (l983); *Akron,* 462 U.S. at 441.

Section 2919.12(B)(1)(a) states, "No person shall knowingly perform or induce an abortion upon a woman who is pregnant, unmarried, under eighteen years of age, and unemancipated" unless a statutory exception is met. Plaintiffs argue that it is unclear whether the word "knowingly" applies only to the performance of the abortion, or whether it also applies to the physician's mental state regarding the status of the young woman. They fear that physicians will be held strictly liable for knowingly performing an abortion upon women whom they did not know were unmarried, under eighteen years of age, or unemancipated. This ambiguity, they assert, will make physicians hesitant about performing abortions on women who appear to be minors, effectively chilling the constitutional rights of women outside the class created by the statute as well as those within it.

Plaintiffs argument is not well taken. Subsection (C)(1) states:

> It is an affirmative defense to a charge under Division (B)(1) or (2) of this section that the pregnant woman provided the person who performed or induced the abortion with false, misleading or incorrect information about her age, marital status, or emancipation. . . and the person who performed or induced the abortion did not otherwise have reasonable cause to believe the pregnant woman was under eighteen years of age, unmarried, or unemancipated. . . .

Clearly, such an affirmative defense would be meaningless if the word "knowingly" were not read to modify the clause describing the young woman's status. A "fair construction" of §2919.12(B)(1)(a) requires that the scienter element be read to apply to both clauses. Thus, the "perils of strict criminal liability" observed by the *Colautti* court are absent, 439 U.S. at 395, and §2919.12(B)(1)(a) is not unconstitutionally vague. *See ACOG,* 737 F.2d at 294 (reading intent requirement into statute to save it from unconstitutionality).

Nor can this Court agree that the other phrases pointed to by the plaintiffs are impermissibly vague. By insisting on definitions of commonly understood words, plaintiffs only confuse their meanings. Phrases such as "reasonable efforts" and "reasonable cause to believe" must be interpreted in the context of of the conduct they modify, as they are in other legal settings. *See Ashcroft,* 462 U.S. at 492 n. 18 ("Although the question of whether a minor is emancipated turns upon the facts and circumstances of each individual case, the Missouri courts have adopted general rules to guide that determination, and the term is one of general usage and understanding in the Missouri common law."). The scienter element in the criminal offense ameliorates any slight uncertainty in these words. *Colautti,* 439 U.S. at 395 (observing close relationship between *mens rea* requirement and constitutionality of ambiguous statute).

However, plaintiffs' arguments regarding the constitutionality of the "constructive order" provisions are quite different. Section 2151.85(B)(1) states that the juvenile court's failure to hold the required hearing within five business days of the filing of the complaint operates as a constructive order that an abortion can be performed without parental notification. Similarly, §2505.073(A) provides that a constructive order will be effective if the court of appeals does not enter a judgment within five days of the docketing of the appeal. A physician will not be either criminally or civilly liable under the statute if either court has constructively authorized the abortion without notification. §2919.12(B)(1)(a)(iv). However, a physician will have no actual notification or tangible evidence that such constructive authorization has been given. Such a "pocket veto" has been found to be unconstitutional by at least one court. *Glick*, 616 F.Supp. at 322.

The state responds that the difficulties presented by a constructive order are part of its very purpose. It argues that the constructive order based on a lack of action is the only way to remedy a court's failure to act promptly. This Court does not share the state's pessimism that proper notification of a doctor that he or she is authorized to proceed cannot be accomplished. For instance, it does not seem unreasonable that the clerk of court could notify the physician at the end of five days that the court has failed to take action. Accordingly, the constructive order provisions of H.B. 319 are constitutionally inadequate.

C. Alleged Defects in the Waiver Procedure

1. Requirement that notice be performed by a physician

Section 2912.19(B)(1)(a)(i) states in part, "No person shall knowingly perform or induce an abortion. . . unless . . . (i). . . the person has given at least 24 hours actual notice . . . ." The language of the statute, then, literally requires that the notification be accomplished by the doctor performing an abortion, rather than by his or her aides or employees. The state tacitly admits that this interpretation is correct by arguing that such a requirement is constitutional.

In *Akron*, the Supreme Court struck down a provision requiring that the counseling necessary for a woman to render informed consent to an abortion procedure be provided by the attending physician. The Court stated:

> We are not convinced, however, that there is as vital a state need for insisting that the physician performing the abortion, or for that matter any physician, personally counsel the patient in the absence of a request. The state's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it.

462 U.S. at 448 (footnote omitted). However, the Court did not reject the notions that the physician be required to verify that adequate counseling be provided and that minimum qualifications be established for counselors. *Id.* at 449.

The state argues that several courts reviewing notification statutes with similar language have failed to object to them on the grounds here asserted. Each case cited by the state is readily distinguishable. *Matheson* was decided two years before *Akron*. This issue was apparently not raised before the Sixth Circuit in *Akron*, 651 F.2d at 1198, nor before the Seventh Circuit in *Pearson*. Moreover, the state's attempt to characterize this duty as "merely ministerial" does not advance its case at all, but rather suggests that its interest in having the physician perform this function is even less weighty than having him or her perform counseling to obtain informed consent. Since requiring the physician to effect notification may add to the cost of abortion procedures, *cf. Akron*, 462 U.S. at 447, while the state's interest is minimal, this provision unduly burdens a minor woman's right to choose an abortion.

2. "Clear and convincing evidence" burden of proof

Section 2151.85(C) mandates that the determinations of whether a minor is sufficiently mature and well enough informed to make her abortion decision without notification, and whether notification would not be in her best interests, must be demonstrated by "clear and convincing evidence" for the juvenile court to issue an order authorizing the abortion to proceed without parental notification. The plaintiffs' challenge to the constitutionality of a burden of proof in a *Bellotti*-type waiver proceeding appears to be an issue of first impression.

A burden or proof does more than just establish a minimum showing which plaintiffs must plead and prove to proceed in a case.

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.". . . The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Addington v. Texas, 441 U.S. 418, 423 (l979). The Supreme Court has required "an intermediate standard of proof — 'clear and convincing evidence' — when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky v. Kramer*, 455 U.S. 745, 756 (l982)(citing *Addington*, 441 U.S. at 424). As a result, the Court has held that the Constitution requires a showing of at least "clear and convincing evidence" by states in mental health commitment cases (*Addington*) and in adjudications of children as permanently neglected (*Santosky*).

The *Santosky* court stated that an inquiry into whether a particular burden of proof satisfies due process must involve the application of the analysis of *Matthews v. Eldridge*,

424 U.S. 319 (l976). 455 U.S. at 754. *Eldridge* identifies three factors to be considered:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 336.

Justice Powell identified the competing interests involved when a minor seeks an abortion in his *Matheson* concurrence:

> The right to make that decision may not be unconstitutionally burdened. *Roe v. Wade*, 410 U.S. 113, 154 (l973); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S., at 74-75. In addition, the minor has an interest in effectuating her decision to abort, if that is the decision she makes. *Id.*, at 75; *Bellotti II*, 443 U.S. at 647. The state, aside from the interest it has in encouraging childbirth rather than abortion, *cf. Maher v. Roe*, 432 U.S. 464 (l977); *Harris v. McRae*, 448 U.S. 297 (l980), has an interest in fostering such consultation as will assist the minor in making her decision as wisely as possible. *Planned Parenthood of Central Mo. v. Danforth*, *supra*, 428 U.S. at 91 (STEWART, J., concurring); *post*, at 1178 (STEVENS, J., concurring in judgment). The state also may have an interest in the family itself, the institution through which "we inculcate and pass down many of our most cherished vaules, moral and cultural." *Moore v. East Cleveland*, 431 U.S. 494, 503-504 (l977). Parents have a traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of

> their children, especially during immature years. *Bellotti II, supra,* 443 U.S., at 637-639.

450 U.S. at 419.

Thus, the waiver procedure required in a parental notification statute will balance the minor woman's constitutional right to choose to abort against the state's interest in promoting family harmony and in insuring that she is fully informed. While the state's interests are weighty, the only constitutional interest involved in this balancing is the woman's privacy right implicated in her decision to abort. In both *Santosky* and *Addington,* the Supreme Court recognized that the liberty interest of the individual outweighs the state's interest in protecting its citizens. The case *sub judice* is closely analogous, and this Court must find that the state's *parens patriae* interest is outweighed by the minor woman's right to choose an abortion.

The remaining *Eldridge* factor, the risk of an erroneous deprivation of the woman's constitutional right, also weighs against the imposition of a "clear and convincing evidence" standard of proof upon the minor. The *Santosky* court noted that one of the factors increasing the likelihood of erroneous decisions in neglect proceedings is "imprecise substantive standards that leave determinations unusually open to the subjective values of the judge." 455 U.S. at 762. This factor is clearly present in the waiver procedure, where judges are called upon to determine whether a young woman is "sufficiently mature and well informed enough" and whether notification is "not in the best interests of the complainant." In addition, the judge is required to make this decision immediately at the end of a hearing resembling an interview more than an evidentiary proceeding. Since the judge's decision will necessarily be based largely upon subjective standards without the benefit of any evidence other than a woman's testimony, perhaps guided by a court-appointed lawyer, the "clear and convincing" standard imposed upon the woman creates an unacceptably high risk of erroneous determinations.

The state relies upon the *ex parte* nature of the waiver procedure to justify the heavy burden on the minor, arguing that parental interests would be unprotected if the minor could obtain a notification waiver at a lower standard in a hearing which parents are not permitted to attend. The state's argument misperceives both the interests implicated by the notification statute and the nature of the waiver proceeding. The state's interests in promulgating a notification statute are to protect the minor from making an inappropriate decision and to promote family integrity; the state's role is not that of an advocate for interests which might be asserted by parents. Moreover, that the alternative consent mechanism envisioned by the *Bellotti II* plurality was not meant to be an adversary proceeding is demonstrated in its caveat that standard judicial proceedings were not constitutionally required, but that "much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction. " 443 U.S. at 643 n. 22. Instead, the alternative procedure is required to allow a factfinder to satisfy himself or herself that the minor's status is such that her decision to abort should stand without parental involvement. The minor seeks to demonstrate that her constitutional right can properly be exercised; the interests of the state and her parents are outweighed if she can properly make this decision, and these interests have no bearing on the determination of her status.

In *Addington* and *Santosky,* the Supreme Court held that due process required that heightened burdens of clear and convincing evidence be placed upon the state when it acted to deprive individuals of a liberty interest. In H.B. 319, the state attempts to place the same burden on individuals seeking to exercise a liberty interest, rather than on itself. Placing this heavy burden of proof on women using the waiver procedure is inconsistent with the teaching of *Addington, Santosky* and *Eldridge* and is constitutionally impermissible.[5]

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[5] The Court proffers no opinion regarding what burden of proof in a waiver procedure would be constitutional.

3. Pleading requirements

Plaintiffs contend that the pleading requirement of H.B. 319 will, on its face, prohibit the juvenile court judges from making constitutionally mandated findings of fact. Specifically, §2151.85(C)(1) requires that the complaint be dismissed if it alleges *only* that the woman is sufficiently mature and well enough informed to make the abortion decision without notification of her parents, and if the judge cannot make that finding. Similarly, §2151.85(C)(2) requires that the complaint be dismissed if the complaint's *only* allegation is that there is evidence of a "pattern of physical, sexual, or emotional abuse" by the parents or that otherwise notification is not in the minor's best interest, and the judge is unable to make that finding. Only if the minor has made both allegations will the court be permitted to make both findings. §2151.85(C)(3). Consistent with those requirements, and pursuant to §2151.85(G), the Clerk of the Supreme Court of Ohio has created three different complaint forms for the waiver proceeding: one contains the "maturity" allegation; a second contains the "best interest" allegation; and a third contains both.[6]

The plain language of *Bellotti II* mandates that both factual determinations be made to protect the constitutional rights of the minor utilizing the waiver procedure:

> We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity — if she so desires — to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.

443 U.S. at 647-648. Thus, the statute's failure to allow the juvenile court to make both determinations unless the minor selects the third complaint form, is unconstitutional.

The state's response that the minor's court-appointed attorney will help her amend the complaint is problematic on several grounds. First, as a practical matter, having two complaint forms which must be discarded by the minor's lawyer and replaced with the only one which is constitutionally correct is nothing short of absurd. Second, the Constitution need not depend on the actions of lawyers to ensure that unconstitutional provisions of state laws are not applied. Finally, there is no guarantee that the minor's lawyer will correct the error, particularly if he or she is unfamiliar with the requirements of *Bellotti II*. Accordingly, §§2151.85(C)(1) and (2) must be deemed constitutionally infirm.[7]

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[6] An examination of the complaint forms reveals that they contain no allegation that the complainant has been subjected to a "pattern of physical, sexual, or emotional abuse" by the parent. However, this Court is barred from requiring the state to conform its conduct to state law by the eleventh amendment. *Pennhurst School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984).

[7] The state's observation that a mature minor will choose to file the complaint with both allegations underestimates the understanding of pleading requirements by laypeople. It also ignores that a minor who feels that she is mature enough to make the decision to abort without parental notification may believe that the additional allegation that notification is not in her best interests is inconsistent.

4. Waiting period

Section 2919.12(B)(1)(i) requires that twenty-four hours must pass after actual notice is given to the proper individual before the physician can perform the abortion, unless one of three exceptions exist. Section 2919.12(C)(2) provides that constructive notice is effective after a forty-eight hour wait. Plaintiffs argue that these waiting periods are unconstitutional, relying upon the Supreme Court's decision in Akron that a twenty-four hour waiting period after counseling is impermissible. 462 U.S. at 450.

The Seventh Circuit has relied upon the rationale of *Akron* to strike down a twenty-four hour waiting period in notification statutes. In *Pearson*, it noted that the waiting period required two trips to the physician, increasing costs and delays, and it characterized the waiting period as "arbitrary and inflexible." 716 F.2d at 1143. In *Zbaraz*, the court concluded that the waiting period does not significantly further the state's interest when combined with the notification requirement. 763 F.2d at 1538.

However, the waiting period in H.B. 319 is not "arbitrary and inflexible," but instead accommodates cases in which the waiting period is unnecessary. The statute provides that the waiting period need not be observed if the minor's parents submit written consent, §2919.12(B)(1)(a)(ii); if the notified parent "clearly and unequivocally" expresses that he or she does not wish to consult with the minor, §2919.12(B)(3); or if the physician performs the abortion in response to "an immediate threat of serious risk to the life or physical health" of the minor. §2919.12(C)(2). Thus, the waiting period is carefully tailored to effectuate actual consultation. Despite the Seventh Circuit's correct observations of the burdens which the waiting period may place upon the minor, the notification procedure which the Supreme Court explicitly upheld for some minors in *Matheson* would be an empty formalism with no practical effect if the abortion could proceed before the parental consultation could take place. Thus, this Court declines to follow the Seventh Circuit's lead in striking down waiting periods, since the waiting period

in this statute is narrowly tailored to effectuate parental consultation after notification.[8]

5. Court-appointed counsel on appeal; Appeal to Ohio Supreme Court

Plaintiffs challenge the constitutionality of a waiver proceeding which does not provide for appointed counsel on appeal or for appeal to the Supreme Court of Ohio. Section 2151.58(B)(2) establishes that a juvenile court hearing a waiver proceeding shall appoint an attorney if the minor has not already retained one. If the court eventually dismisses the complaint, it is obligated to immediately notify the complainant of her right to appeal. §2151.85(E). Section 2505.073, which provides for an appeal of a dismissal by the juvenile court to the court of appeals, states that a notice of appeal filed with the clerk of the juvenile court within four days of the dismissal will result in the forwarding of the record to the clerk of the court of appeals and the docketing of the appeal. Although the filing of a brief and oral argument are contemplated by the statute, it states that "the court of appeals. . . shall liberally modify or dispense with the formal pleading requirements that normally apply as to the contents and form of an appellant's brief." §2505.073(A).

In *Pearson*, the Seventh Circuit held that *Bellotti II*'s command that the waiver proceeding provide "an *effective* opportunity for an abortion to be obtained," 716 F.2d at 1137 (emphasis of the *Pearson* court), required that counsel must be appointed for the minors exercising their rights. 716 F.2d at 1138. The court reached this conclusion by relying on the likelihood that court-appointed counsel is the only option for representation available to minors, the minor's need for aid in presenting her case, and the possibility that attorneys

[8] Even the *Pearson* court upheld a forty-eight hour constructive notice provision, to the extent that the parent had not responded during that period of time. 716 F.2d at 1143.

will not volunteer to represent minors in these hearings. *Id.* at 1137-1138.

The *Pearson* court noted the basic rule that "due process generally does not require that a state provide a civil litigant with counsel." *Id.* at 1137. The Supreme Court confronted this issue in *Lassiter v. Department of Social Services of Durham County,* 452 U.S. 18 (1981), where an indigent mother argued that she had been denied due process because counsel had not been appointed for her in a proceeding to terminate her parental rights. The Court stated that the three *Eldridge* factors must be weighed against the presumption that an indigent litigant only has a right to appointed counsel when facing a loss of his or her physical liberty in order to determine whether appointment of an attorney is constitutionally required. *Id.* at 31. Although in some situations the three *Eldridge* factors might outweigh the presumption, the Court found that this is not inevitably so. It concluded that the appointment of counsel is not constitutionally required in every parental termination proceeding, but that the trial court should decide whether in a given case due process required that counsel be appointed. *Id.* at 31-32.

Based on *Lassiter's* holding, this Court rejects the argument that appointment of counsel is constitutionally required in every appeal from a dismissal of an abortion petition. Such a determination may instead by made on a case-by-case basis. The need for an attorney in the appeals process is obviated by the guidance to be given the minor at the trial level and the statutory command that a minor's "brief" shall be liberally accepted. Moreover, "argument" can be waived if the minor does not wish to speak with the appeals panel, although she might find doing so beneficial rather than penalizing. However, whether counsel shall be appointed for the appeal can be left to the discretion of the court.

Plaintiffs' argument that failure to provide for an appeal to the Ohio Supreme Court is a constitutional deficiency is also unavailing. While *Bellotti II* mentions "any appeals which may follow," 443 U.S. at 644, it does not intimate that two

appeals are constitutionally required. Nor do plaintiffs cite any case holding that an appeal to the supreme court is essential. In fact, the Constitution of Ohio establishes appellate jurisdiction as a matter of right only for cases originating in the courts of appeals, cases in which the death penalty has been affirmed, and cases involving questions arising under the Constitution of the United States or Ohio. Ohio Const. art. IV, §2(a). Thus, an appeal of a dismissal and an affirmance to the highest court is not constitutionally required in H.B. 319. *Cf. Ross v. Moffitt,* 417 U.S. 600 (1974)(refused to extend constutional requirement that counsel be appointed to indigent criminal defendant for first appeal as of right to discretionary appeals).[9]

6. Self-incrimination

Plaintiffs contend that a minor woman admitting that she engages in sexual activity by using the waiver procedure exposes herself to an adjudication as an "unruly child." In *re J.P.,* 32 Ohio Misc. 5 (Stark Co. C.P. 1972); Ohio Rev. Code Ann. §2151.02.2 (Page 1976)(" 'Unruly child' includes any child:. . . (C) Who so deports himself as to injure or endanger the health or morals of himself or others. . . ."). Ohio Rev. Code Ann. §2151.35.4 (Page 1976)("§2151.35.4") provides for the disposition of an unruly child:

> If the child is adjudged unruly the court may:
>
> (A) Make any of the dispositions authorized under section 2151.353 [2151.35.3] of the Revised Code [governing abused, neglected or dependent children];
>
> (B) Place the child on probation under such conditions as the court prescribes;

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[9] The issue of whether appointment of counsel before the initial factfinder is constitutionally required is not before this Court, since H.B. 319 already provides that counsel shall be appointed.

(C) Suspend or revoke the operator's or chauffeur's license issued to such child; suspend or revoke the registration of all motor vehicles registered in the name of such child.

If after making such disposition the court finds, upon further hearing, that the child is not amendable to treatment or rehabilitation under such disposition, the court may make a disposition otherwise authorized under section 2151.355 [2151.35.5] of the Revised Code [governing delinquent children].

Plaintiffs assert that since an unruly child can be placed in a "youth home" under Ohio Rev. Code Ann. §2151.35.3 (Page Supp. 1985), or a juvenile correctional institution under Ohio Rev. Code Ann. §2151.35.5 (Page Supp. 1985), a minor seeking to use the waiver proceeding would be forced to forego her fifth amendment right against self-incrimination.

The right against self-incrimination applies to juveniles as well as to adults. *In re Gault*, 387 U.S. 1, 55 (1967). Although juvenile proceedings are often characterized as "civil" rather than "criminal," the availability of the privilege depends upon the exposure which a statement invites. *Id.* at 49. Thus, "juvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination." *Id.*

Plaintiffs' contention that a minor's use of the waiver procedure invokes the principles of *Gault* requires a considerable stretch of the imagination. First, they are able to cite only one case, which is more than a decade old, where a minor has been adjudicated "unruly" for having engaged in sexual activity with another minor. Then they submit that the possibility that a minor will be placed in the custody of a state or county social service agency requires fifth amendment protection. *Gault*, however, referred to "commitment to a state institution" for criminal conduct; this Court cannot entertain the suggestion that *Gault* requires

fifth amendment protection for statements which might remove an abused or neglected child from a bad home. Finally, plaintiffs point out that §2151.35.4 permits an unruly child to be treated as a delinquent child if "the child is not amenable to treatment or rehabilitation" under a previous disposition. The connection between requesting a waiver from parental notification for an abortion and commitment in a state institution as a juvenile delinquent is too tenuous to be taken seriously in a facial attack on the validity of the statute.[10] Plaintiffs' fifth amendment argument must be rejected.

7. Waiver procedure - expedition

Plaintiffs argue that the time-frame established by the statute for the waiver proceeding is too long to pass constitutional muster under *Bellotti II*'s command that "[t]he proceeding . . . must assure that a resolution of the issue and any appeals that may follow will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." 443 U.S. at 644. Section 2151.85(B)(1) provides that the juvenile court shall hold its hearing "at the earliest possible time, but not later than the fifth business day after the day that the complaint is filed." The court is then required to enter its judgment immediately after the hearing is concluded. *Id.* The timeliness of the appeals process is governed by §2505.073(A):

A complainant whose complaint under section 2151.85 of the Revised Code is dismissed by a juvenile court, may appeal in accordance with this section. Within four days after a notice of appeal is filed in an action arising under that section, the clerk of the juvenile court shall deliver a copy of

[10] At argument, the state moved to strike several exhibits from the record, including the Affidavit of William A. Kurtz, which states that minor women have been adjudicated "unruly" by the Juvenile Court of Cuyahoga County based upon their sexual activity. However, plaintiffs have not moved for the admission of these exhibits into evidence, and the Court does not rely upon them in this facial challenge to H.B. 319.

the notice of appeal and the record on appeal to the clerk of the court of appeals named in the notice. Upon receipt of the notice and record, the clerk of court of appeals shall place the appeal on the docket of the court.

The appellant shall file her brief within four days after the appeal is docketed. Unless the appellant waives the right to oral argument, the court of appeals shall hear oral argument within five days after the appeal is docketed. The court of appeals shall enter judgment in the appeal immediately after the oral argument or, if oral argument has been waived, within five days after the appeal is docketed.

* * *

Upon motion of the appellant and for good cause shown, the court of appeals may shorten or extend any of the maximum times set forth in this division . . .

Although §2505.073 does not enunciate whether it refers to calendar or business days, the Court must assume that Ohio Civ. R. 6, which prescribes that intermediate Saturdays, Sundays, and legal holidays shall be excluded from computations of periods of time of less than seven days, applies. Thus, a diligent complainant who is forced to appeal would wait approximately three weeks for a final resolution of her case.

Since *Bellotti II*, the only statement by the Supreme Court regarding expediency is set forth in *Ashcroft:*

> As to expedition of appeals, §188.028.2(6) provides in relevant part:
>
> "The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be

> completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section."

We believe this section provides the framework for a constitutionally sufficient means of expediting judicial proceeding. Immediately after the effective date of this statutory enactment, the District Court enjoined enforcement. No unemancipated pregnant minor has been required to comply with this section. Thus, to this point in time, there has been no need for the State Supreme Court to promulgate rules concerning appellate review. There is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions.

462 U.S. at 491 n. 16. Several courts have looked to this language as a benchmark for expedition and have enjoined notification statutes pending rulemaking by appellate courts. *ACOG*, 737 F.2d at 297; *Zbaraz*, 763 F.2d at 1541; *Glick*, 616 F. Supp. at 327.

In enacting H.B. 319, however, the Ohio legislature did not delegate authority for developing an expeditious appellate process to the state supreme court, but instead specified exact periods of time. This Court, then, must evaluate the expedition of the waiver proceeding from the face of the statute, not from the perspective of whether it could be rendered constitutional by rulemaking of the Ohio supreme court.

The Supreme Court has clearly recognized that time is of the essence when deciding whether to proceed with an abortion. *Matheson*, 450 U.S. at 412; *see Roe*, 410 U.S. at 150 (risk to maternal health increases as pregnancy continues). The *Glick* court has stated that a waiver

procedure requiring about three weeks to complete "raises serious questions of the statute's constitutionality because time lost in the first trimester is crucial." 616 F. Supp. at 326. This Court must agree that a three week procedure, such as that in H.B. 319, is unconstitutionally long. Even though the statute before the Court requires that the appeal be docketed within four days — a shorter period than that found to be constitutionally sufficient in *Ashcroft*, the periods of five business days allocated to the juvenile and appellate courts are of questionable length when considered separately, and clearly unconstitutional when added together. Judicial notice may be taken of the fact that teenage women, in general, are inclined towards irregular periods. Consequently, a minor will require at least eight to ten weeks to discover and confirm that she is pregnant and to consider her options. The three week period needed to obtain permission to proceed with an abortion without parental notification will push her close to, if not into, her second trimester of pregnancy. Not only will the abortion procedure become risky enough at that time to justify state intervention to protect her health, *Roe*, 410 U.S. at 163, but the cost of the procedure must also rise to cover the cost of state regulation.

The time-frame created by H.B. 319 is not saved from unconstitutionality by §2505.073's provision that the court of appeals may lengthen or shorten the maximum times set forth therein. A cursory examination of a map of Ohio demarcating the areas of the respective courts of appeals suggests that many courts will be pressured to convene and hear an appeal in even five business days. The Fourth Circuit Court of Appeals, for instance, hears appeals from thirteen counties in southern Ohio. If the three judges who sit in that circuit are not scheduled to sit together within the five day period, or a substitute judge is not readily available, it may be difficult to convene within the week, to say nothing of receiving and reviewing the record of the juvenile court within that time. It is unlikely that appellate courts faced with

such problems of time and geography would be in a position to expedite a hearing at an appellant's request.[11]

It is clear that the waiver procedure created by the General Assembly could be drafted to insure a more expeditious time frame. Most obviously, the five day period given to the trial court seems unnecessarily long. However, the exact procedure which is constitutionally acceptable must be developed by the legislature, rather than by this Court. This Court holds only that the procedure set forth in H.B. 319 does not meet the constitutional requirement of expedition demanded by *Bellotti II*.

8. Waiver procedure - confidentiality

Bellotti II commands that a waiver procedure must be confidential as well as expeditious. 443 U.S. at 644. In an apparent attempt to comply with this mandate, the legislature provided that records of such proceedings under §2151.85 are not "public records," Ohio Rev. Code Ann. §149.43 (Page Supp. 1985), and it provided generally that any such procedure be "conducted in a manner that will preserve the anonymity" of the complainant. §§2151.85(F), 2505.073(B). The complaint form instructions promulgated by the Clerk of the Ohio Supreme Court state:

> Confidentiality: The confidentiality of this proceeding will be maintained by the court, its officers and employees. In order to preserve this confidentiality, the court will consider your name to be Jane Doe and, in all proceedings and documents, will refer to you as Jane Doe or complainant. If you do not have any attorney, you must, however, sign your real name at the end of

[11] Of course, if a circuit court is unable to overcome these problems within the five days, it will have no opportunity to decide the case, and a constructive order will be effected. If this should happen, the minor would have been forced to delay her abortion for three weeks, perhaps dangerously, without the interest of the state being advanced at all.

> the complaint and give an address where the court can contact you throughout this proceeding.

Despite these laudable steps toward complying with *Bellotti II*'s anonymity requirement, the waiver procedure is fraught with confidentiality problems.

The Third Circuit has stated:

> The Missouri statute upheld in *Ashcroft* establishing alternative court proceedings for minor consent contained detailed provisions assuring confidentiality and dispatch, establishing a clear and simple procedure for the minor to follow in setting forth her petition, and directing court personnel to assist the minor in preparing the petition. *Ashcroft,* 103 S.Ct. at 2519-20 n. 4, 2525-26. Comparable provisions are absent in the Pennsylvania statute. This difference is critical. To pass constitutional muster, the alternative judicial procedure must be an established and practical avenue and may not rely solely on generally stated principles of availability, confidentiality, and form.

ACOG, 737 F.2d at 297. H.B. 319 contains little more than the "generally stated principles of. . . confidentiality" condemned by the Third Circuit. The complaint forms do permit the minor to identify herself by a pseudonym. *Cf Ashcroft,* 462 U.S. at 491 n.16 (confidentiality is assured by use of minor's initials on petition). However, other problems are not dealt with by the statute or the forms. The complaint form requires the petitioner to give an address where she can be reached throughout the proceeding. It is difficult to believe that a minor could give any such address except that of her parents. Moreover, there are no indications of how clerks offices shall assure that the record of these cases will be distinguished from the records of all other cases which are available to the public. Nor are these measures for the storage of the record after the case is closed to prevent its public availability.

Even the venue provisions of §2151.85 exacerbate the confidentiality problem. Subsection (A) provides that a complaint may be filed:

> [I]n the juvenile court of the county in which she has a residence or legal settlement, in the juvenile court of any county that borders to any extent the county in which she has a residence or legal settlement, or in the juvenile court of the county in which the hospital, clinic, or other facility in which the abortion would be performed or induced is located. . .

If the minor resides in a small or rural county, she may be recognized and receive no anonymity, particularly if she is from a prominent family. The venue provisions prevent her from going to a county where she might be assured of anonymity.

In addition to these practical problems, there are other provisions of Ohio law which directly contradict the *Bellotti II* requirement of anonymity. Ohio Juv. R. 16 requires that a summons for a juvenile court proceeding "shall direct the party served to appear at a stated time and place . . . ." Ohio J[illegible] R. 2(16) defines a "party" as "a child who is the subject of a juvenile court proceeding,. . . his parent . . . ." *See* Ohio Rev. Code Ann. §2151.28 (Page 1976) ("§2151.28")(requiring service of summons on a child's parents). *See also Akron,* 462 U.S. at 441 n. 31 (notification under §2151.28 of the mature minor's parents would be unconstitutional). In addition, Ohio Rev. Code Ann. §2151.42.1 (Page Supp. 1985) contains a mandatory reporting requirement for any attorney, among others, who in the course of his or her professional duties has reason to believe that a child has been abused or neglected. Such a report commences an investigation by local officials in charge of children's services. Thus, an attorney representing a minor who alleges to the court in a waiver proceeding that notification would not be in her best interest because of abuse would be statutorily obligated to report this allegation to local officials. Both statutes clearly contain

requirements which abrogate the confidentiality necessary in a constitutional waiver procedure. Thus, this Court must find that the waiver procedure of H.B. 319 is constitutionally defective for failing to insure confidentiality to the minor who uses it.

V.

The discussion in Part IV has established that there are numerous constitutional defects with the waiver procedure established in §2151.85 and §2505.073. To repeat: the provisions (1) establishing constructive authorization; (2) requiring the physician to perform the notice; (3) mandating that a minor prove her maturity or that notification is not in her best interest by "clear and convincing evidence"; and (4) preventing juvenile court judges from making both findings required by *Bellotti II* in all cases, are unconstitutional. In addition, the waiver procedure unconstitutionally fails to insure (5a) expedition and (5b) confidentiality.

The question of severability remains. At the outset, this Court notes that H.B. 319 does not contain a severability clause. More importantly, the legislature, rather than this Court, must repair the defects in the waiver procedure. Since the waiver procedure cannot be enforced in its present state, the notification requirements must also be enjoined to avoid violations of the constitutional rights of mature minors and minors for whom notification would not be in their best interests. *Pearson*, 716 F.2d at 1143; *Glick*, 616 F. Supp. at 327. Accordingly, H.B. 319 must be struck down in its entirety.

In sum, this Court holds that H.B. 319 violates the due process rights of minor women who are mature enough to decide to terminate a pregnancy without parental involvement, and of minors for whom notification is not in

their best interests.[12] Defendants Slaby and rosen are permanently enjoined from enforcing the statute. The Court will entertain a petition for attorneys' fees from plaintiffs.

IT IS SO ORDERED.

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

[12] Since the Court finds that H.B. 319 must be enjoined in full because it violates due process, the Court does not reach plaintiffs' equal protection argument.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AKRON CENTER FOR REPRODUCTIVE HEALTH, et. al.,	:	
	:	CASE NO. 86-3664
Plaintiffs,	:	
V.	:	
LYNN SLABY, et. al.,	:	
Defendants,	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Intervening Defendant State of Ohio hereby appeals to the Supreme Court of the United States from the final judgment of the United States Sixth Circuit Court of Appeals entered in this action on August 12, 1988.

This appeal is taken pursuant to 28 U.S.C. Section 1254(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal To The Supreme Court of the United States has been forwarded to Linda R. Sogg, Esq.. 1100 National City Bank Building; Cleveland, Ohio 44114; Elinor R. Alger, Esq., 360 South Third Street, Columbus, Ohio 43215; Roger K. Evans, Esq., Planned Parenthood Federation of America, 810 Seventh Avenue, New York, New York, 10019, Attorneys for Plaintiffs; Larry G. Poulos, Chief Counsel, Civil Division, Summit County Safety Building, 53 East Center Street, Akron, Ohio 44308, Attorney for Slaby; and Patricia C. Ambrose, Esq., 161 South High Street, Suite 202, Akron, Ohio 44308, Attorney for Rose, via the U.S. Mail, this _____ day of October, 1988.

RITA S. EPPLER
Assistant Attorney General

MOTION

Supreme Court, U.S.
FILED
JAN 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF OHIO,

Appellant,

—vs.—

AKRON CENTER FOR REPRODUCTIVE HEALTH, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT	1
ARGUMENT	
I. THE PHYSICIAN NOTICE PROVISION UNDULY BURDENS MINORS' RIGHT TO ABORTION AND, STANDING ALONE, RENDERS THE ENTIRE ACT UNCONSTITUTIONAL	4
A. The Physician Notice Provision Is Unconstitutional	4
B. The Invalidity Of The Physician Notice Provision, Standing Alone, Renders The Entire Act Invalid	5
II. THE ISSUE OF WHETHER A PARENTAL NOTIFICATION LAW MUST HAVE A JUDICIAL BYPASS IS NOT PROPERLY RAISED IN THIS CASE AND, IN ANY EVENT, IS A SETTLED LEGAL ISSUE	5
III. THE ACT'S JUDICIAL BYPASS MECHANISM, IS UNCONSTITUTIONAL UNDER STANDARDS SET BY THIS COURT	8
CONCLUSION	14

TABLE OF AUTHORITIES

Cases: PAGE

Akron Center for Reproductive Health v. Rosen, 633 F. Supp. 1123 (N.D. Ohio 1986) 4, 5, 10, 11, 12

Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988)..... *passim*

American College of Obstetricians and Gynecologists v. Thornburgh, 656 F. Supp. 879 (E.D. Pa. 1987)..... 10

Barnes v. Mississippi, No. J86-0458(W) (S.D. Miss. July 2, 1986) 12

Bellotti v. Baird, 443 U.S. 622 (1979).....1, 6, 7, 9, 11, 12

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 10

City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 4, 5, 6, 7

Colautti v. Franklin, 439 U.S. 379 (1979)..... 13

Frisby v. Schultz, 108 S. Ct. 2495 (1988) 10

Glick v. McKay, 616 F. Supp. 322 (D. Nev. 1985)...7, 10, 12

H.L. v. Matheson, 450 U.S. 398 (1981)..... 3, 6

Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988) 3, 7, 14

Indiana Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127 (7th Cir. 1983).....3, 7, 8

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 1

Margaret S. v. Treen, 597 F. Supp. 636 (E.D. La. 1984) 3

Matter of Anonymous Minor, 531 So.2d 901 (Ala. 1988)..... 2, 3

PAGE

Muskrat v. United States, 219 U.S. 346 (1911) 5

Orr v. Knowles, No. CV81-0-301 (D. Neb. Sept. 16, 1983)..... 7

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)..... 2

Planned Parenthood Ass'n of the Atlanta Area v. Harris, 670 F. Supp. 971 (N.D. Ga. 1987) 7, 10

Planned Parenthood Ass'n of the Atlanta Area v. Harris, 691 F. Supp. 1419 (N.D. Ga. 1988) 12

Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 462 U.S. 476 (1983) 1, 3, 9, 10

Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 655 F.2d 848 (8th Cir. 1981) 9

Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006 (1st Cir. 1981)..... 3

Roe v. Corbin, Civ. 85 No. 2118 Phoenix CLH (D. Ariz. Sept. 23, 1985) 7, 8

Roe v. Corbin, Civ. 85 No. 2118 Phoenix CLH (D. Ariz. Aug. 14, 1987) 2

Santosky v. Kramer, 455 U.S 745 (1982)..... 13

State v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (Wash. 1975)..... 2

T.L.J. v. Webster, 792 F.2d 734 (8th Cir. 1986)..... 3

Women's Community Health Center v. Cohen, 477 F. Supp. 542 (D. Me. 1979) 7

Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir. 1985), *aff'd mem.*, 108 S. Ct. 479 (1987) 6, 7

PAGE

Statutes and Rules:

Ala. Code §§ 26-21-3, 26-21-4 (Michie Co. Supp. 1988) 2

Ariz. L. 1982, ch. 184, § 2 8

Ga. Code Ann. §§ 15-11-5, 15-11-110-118 (Supp. 1988). 8

Ill. Rev. Stat. ch. 38 §§ 81-65 to 81-70 (Smith Hurd Supp. 1988) 8

Ind. Code Ann. § 35-1-58.5-2.5 (West 1986) 2

Ind. House Enrolled Act No. 1144 (February 25, 1982). 8

La. Rev. Stat. Ann. § 40:1299.35.5 (West Supp. 1988) . 2

Mass. Gen. Laws Ann. ch. 112 § 12S (West 1983) 2

Minn. Stat. Ann. § 144.343(2)-(7) (West Supp. 1988)... 8

Mo. Ann. Stat. § 188.028 (Vernon Supp. 1988)..... 2

Neb. Rev. Stat. § 28-347 (1),(2) (Michie Co. 1985)..... 8

Nev. Rev. Stat. § 442.255 (Michie Co. 1987) 8

N.D. Cent. Code § 14.02.1-03.1 (Allen Smith Co. Supp. 1987)..... 2

Ohio Rev. Code Ann. §§ 2151.85, 2919.12, 2505.073 (Anderson 1987)..... *passim*

Okla. Stat. Tit. 63 § 1-736 (West 1984)..... 2

R.I. Gen. Laws. § 23-4.7-6 (Michie Co. 1985)..... 2

Tenn. Code § 37-10-303 (effective July 1, 1989) 2

Utah Code Ann. § 76-7-304 (Allen Smith Co. 1978).... 2

W. Va. Code §§ 16-2F-1 to 16-2F-9 (Michie Co. 1985) . 2, 8

Sup. Ct. R. 16.1 (c)..... 1

Ohio R. App. P. 14(A)..... 10

PAGE

Opinions of Attorneys General:

Alaska Op. Att'y Gen. (Oct. 21, 1976) 2

Delaware Op. Att'y Gen. (March 24, 1977) 2

Maryland Op. Att'y Gen. No. 85-035 (Dec. 31, 1985) .. 2, 7

Tennessee Op. Att'y Gen. No. 84-239 (Aug. 7, 1984)... 7

STATEMENT

Appellees ("plaintiffs") move to affirm the judgment of the Court of Appeals for the Sixth Circuit holding unconstitutional Ohio Amended Substitute House Bill 319 ("the Act"). The basis for this motion is that the judgment is clearly correct and raises no substantial issues meriting plenary review by this Court. Sup. Ct. R. 16.1(c). In addition, with respect to the first question the appellant ("State") raises in its Jurisdictional Statement—whether the Constitution requires a judicial bypass for parental notification laws—this case presents no justiciable controversy.

The State seeks to justify its request for plenary review in this case on the basis that the Court of Appeals' judgment is symptomatic of a nationwide crisis in federalism caused by the repeated frustration by federal courts of states' good faith efforts to enact legislation encouraging parental involvement in minors' abortions. Moreover, the State attempts to portray the law in this field as in disarray, with "no consistent guidelines . . . available on the standards to apply in analyzing the constitutionality of notice statutes." Jurisdictional Statement ("J.S.") at 17. These claims are vastly exaggerated, both as to the judgment below and the status of the law on this subject nationwide.

This Court will find, as set forth below, that the Act, far from reflecting "careful legislative drafting and attention to all prior precedents," J.S. at 16; is riddled with legislative efforts to undermine the unambiguous constitutional mandates this Court has set forth in cases like *Bellotti v. Baird*, 443 U.S. 622 (1979) and *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983). Far from riding roughshod over local prerogatives, therefore, the Court of Appeals, in invalidating the Act, was well within its traditional function of saying "what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Other lower federal courts have done no more. State laws which follow this Court's constitutional mandates have been

upheld. Those that do not have been invalidated. Nine states have parental involvement laws in effect;[1] five of these have sur-

1 Alabama, Ala. Code § 26-21-3, § 26-21-4 (Michie Co. Supp. 1988) (consent); Indiana, Ind. Code Ann. § 35-1-58.5-2.5 (West 1986) (consent); Louisiana, La. Rev. Stat. Ann. § 40:1299.35.5 (West Supp. 1988) (consent); Massachusetts, Mass. Gen. Laws Ann. ch. 112 § 12S (West 1983) (consent); Missouri, Mo. Ann. Stat. § 188.028 (Vernon Supp. 1988) (consent); North Dakota, N.D. Cent. Code § 14.02.1-03.1 (Allen Smith Co. Supp. 1987) (consent); Rhode Island, R.I. Gen. Laws § 23-4.7-6 (Michie Co. 1985) (consent); Utah, Utah Code Ann. § 76-7-304 (Allen Smith Co. 1978) (notice); West Virginia, W. Va. Code §§ 16-2F-3 to 16-2F-6 (Michie Co. 1985) (notice). *See also* Tennessee, Tenn. Code § 37-10-303 (effective July 1, 1989).

The State lists twelve parental involvement laws in effect and "yet to be challenged in federal court due to their recent enactment": Arizona, Alabama, Alaska, Delaware, Idaho, North Dakota, Maryland, Montana, Oklahoma, South Dakota, Washington, and West Virginia. J.S. at 16 and n.6. This statement is inaccurate for many reasons. The only laws arguably of recent enactment are Alabama's (1987), which was challenged and found constitutional by that state's highest court, *Matter of Anonymous Minor*, 531 So.2d 901 (Ala. 1988), and Arizona's (1987), which was enjoined as unconstitutional by a federal court and not appealed, *Roe v. Corbin*, Civ. 85 No. 2118 Phoenix CLH (D. Ariz. Aug. 14, 1987). Washington's law was found unconstitutional by the state's highest court in 1975. *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (Wash. 1975). Alaska, Delaware, and South Dakota have parental consent laws which predate this Court's 1976 decision in *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976) and are presumptively unconstitutional under that decision. (Attorneys General in Alaska and Delaware announced non-enforcement policies after *Danforth*. Alaska Op. Att'y Gen. (October 21, 1976); Delaware Op. Att'y Gen. (March 24, 1977)). The parental notice laws of Idaho, Maryland, and Montana also predate *Danforth*, are presumptively unconstitutional because they lack a judicial bypass and are not actively enforced (Maryland's Attorney General has announced a non-enforcement policy. Maryland Op. Att'y Gen. No. 85-035 (December 31, 1985)). Only North Dakota's and West Virginia's laws, effective in 1975 and 1984, respectively, are in effect and have never been challenged. The Oklahoma statute the State cites, Tit. 63 § 1-736 (West 1984), requires that the attending physician who performs an abortion fill out a form indicating whether consent was provided by the patient, her parent, guardian, or a court. It contains no requirement of parental consent.

vived constitutional challenges.[2] Moreover, the federal courts have acted with remarkable unanimity on the issues involved in this and similar cases, ranging from the broad question of whether the Constitution requires a judicial bypass for both consent and notice laws to the specifics of what protections such a bypass must contain. This unanimity is reflected in the Court of Appeals' judgment at issue here, which is well within the mainstream on all these points.[3]

The mandates of this Court, together with their consistent application by the lower federal courts, have provided a body of clear guidelines to states which desire to draft constitutional parental involvement legislation. The so-called "tension between legislative action and judicial decisions" in this area, J.S. at 17, results from the disregard of these guidelines by states like Ohio, not from any overreaching by the federal judiciary.

2 Alabama, *Matter of Anonymous Minor*, 531 So. 2d 901 (Ala. 1988); Louisiana, *Margaret S. v. Treen*, 597 F. Supp. 636 (E.D. La. 1984); Massachusetts, *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981); Missouri, *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983), *T.L.J. v. Webster*, 792 F.2d 734 (8th Cir. 1986); Utah, *H.L. v. Matheson*, 450 U.S. 398 (1981). Moreover, Indiana's parental consent law was enacted after its predecessor notification law was ruled constitutionally defective. *Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127 (7th Cir. 1983). The new law remains unchallenged.

3 The State alludes vaguely to a "dramatic contrast" between the judgment below and that of the Eighth Circuit Court of Appeals in *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (en banc). J.S. at 13. As the State concedes later, however, *Hodgson* joined the unanimous judicial opinion that a bypass mechanism is required for a parental notification law. J.S. at 17-18, citing 853 F.2d at 1457. Other issues in *Hodgson*—the validity of a two-parent notification requirement and a waiting period between notification of parents and the abortion—are not relevant to this case.

ARGUMENT

I. THE PHYSICIAN NOTICE PROVISION UNDULY BURDENS MINORS' RIGHT TO ABORTION AND, STANDING ALONE, RENDERS THE ENTIRE ACT UNCONSTITUTIONAL

The Act requires the attending physician personally to notify the minor's parent. Ohio Rev. Code Ann. § 2919.12 (B). The Court of Appeals and the District Court correctly found the constitutionality of this provision foreclosed by this Court's holding in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 448 (1983) that states may not require physicians personally to obtain informed consent from patients. Moreover, because this requirement is not severable from the balance of the Act, its invalidity, standing alone, renders the entire Act unconstitutional.

A. The Physician Notice Provision Is Unconstitutional

The State argues here that *City of Akron* does not govern this case because the Act, unlike the Akron ordinance, does not require that specific information be discussed with a patient. J.S. at 27. *City of Akron*, however, considered the issue of who obtains informed consent apart from the issue of whether the State may require a specific dialogue. There is simply no State interest, this Court said, which justifies requiring that the physician, as opposed to another qualified person, impart to the patient whatever information is necessary to obtain informed consent. 462 U.S. at 448. The same is true of the State's supposed interest here that the physician have "an opportunity" to obtain medical information from a parent. J.S. at 27. The State has put forward no reason why the physician cannot delegate this function to another qualified individual.

The State's attempt to justify this requirement as advancing medical knowledge must be taken with a grain of salt, however, since it initially argued that the requirement created no burden at all because it imposed "merely ministerial" duties on physicians. *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123, 1135 (N.D. Ohio 1986); Jurisdictional Statement Appendix ("J.S.A.") at A-79. Thus, the State dresses up with *post hoc* rationalizations an attempt to subvert the clear holdings of this Court. The judgment below should be affirmed.

B. The Invalidity Of The Physician Notice Provision, Standing Alone, Renders The Entire Act Invalid

The invalidity of the requirement that physicians personally perform parental notification renders the entire Act invalid. As the District Court found, and the State has not disputed, neither this, nor any other provision of the Act, is severable. 633 F. Supp. at 1144; J.S.A. at A-98. Standing alone, therefore, the invalidity of the physician notice requirement provides an independent basis to affirm the judgment below.

II. THE ISSUE OF WHETHER A PARENTAL NOTIFICATION LAW MUST HAVE A JUDICIAL BYPASS IS NOT PROPERLY RAISED IN THIS CASE AND, IN ANY EVENT, IS A SETTLED LEGAL ISSUE

Despite the fact that the Act contains a judicial procedure whereby certain minors may obtain a waiver[4] of the Act's parental notification requirement, the State asks this Court to grant plenary review to decide whether that procedure is constitutionally required. Should the Court grant this request, it would render nothing more than an advisory opinion to guide the State's future legislative undertakings, a role this Court has long eschewed. *Muskrat v. United States*, 219 U.S. 346 (1911).

Even assuming, *arguendo*, that this issue is properly before the Court, it is hardly one of "monumental import," as the State suggests. J.S. at 12. The lower federal courts are unanimous in considering it to have been settled by this Court's decision five years ago in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

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4 Throughout this motion plaintiffs refer to this procedure as "bypass" or "judicial bypass."

City of Akron makes clear that the requirement of a bypass mechanism, first announced in *Bellotti v. Baird*, 443 U.S. 622 (1979), as applied to a law which required parental consent for abortion, applies as well to laws requiring notification to parents. "State and parental interests," this Court said, "must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental *involvement*." 462 U.S. at 427 n.10 (emphasis added). Accordingly, it ruled that an Akron, Ohio parental consent ordinance failed to meet constitutional standards because, when interpreted together with the Ohio Juvenile Code, it made

> no provision for a mature or emancipated minor completely to avoid hostile parental involvement, by demonstrating to the satisfaction of the court that she is capable of exercising her constitutional right to choose an abortion. On the contrary, the statute requires that the minor's parents be notified once a petition has been filed . . . , a requirement that in the case of a mature minor seeking an abortion would be unconstitutional. See *H.L. v. Matheson*, 450 U.S. at 420 (Powell, J., concurring); *id.* at 428 n.3 (Marshall, J., dissenting).

Id. at 441 n.31.[5]

5 The State cites this Court's evenly divided affirmance of the Seventh Circuit's judgment in *Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd mem.*, 108 S. Ct. 479 (1987), as evidence that this issue remains unsettled. No such inference can be drawn, however. The "questions presented" in the jurisdictional statement in that case were the constitutionality of the waiting period between parental notification and the minor's abortion and whether the bypass provision guaranteed sufficient speed and confidentiality at the appellate level. 54 U.S.L.W. 3399 (U.S. December 10, 1985). Additionally, this Court was concerned with the question of whether it had jurisdiction over the appeal. Thus, it postponed a scheduled oral argument, in part, in order to obtain supplemental briefing on that issue. 55 U.S.L.W. 3661 (U.S. March 31, 1987) and 55 U.S.L.W. 3694 (U.S. April 14, 1987). Although in its supplemental brief the State of Illinois argued that a bypass mechanism was not constitutionally required, that argument was not within the scope of the issues presented and there is no evidence that the four votes not to affirm the judgment below focused on that issue, rather than any one or all of the other three issues (including that of jurisdiction) which were squarely presented.

Within three months of *City of Akron*, the Court of Appeals for the Seventh Circuit said, citing the above quoted language, "this issue has now been settled": states must provide bypass procedures in connection with both consent and notification statutes. *Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983). Every federal court which has considered the issue subsequently has followed suit, including the courts below, *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852, 861 (6th Cir. 1988); J.S.A. at A-17; *Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985), *aff'd mem.*, 108 S. Ct. 479 (1987); *Hodgson v. Minnesota*, 853 F.2d 1452, 1456 (8th Cir. 1988); *Glick v. McKay*, 616 F. Supp. 322, 325 (D. Nev. 1985), *appeal pending*; *Planned Parenthood Ass'n of the Atlanta Area v. Harris*, 670 F. Supp. 971, 985 (N.D. Ga. 1987); *Roe v. Corbin*, Civ. 85 No. 2118 Phoenix CLH (D. Ariz. Sept. 23, 1985) (order granting preliminary injunction); *Orr v. Knowles*, No. CV81-0-301 (D. Neb. Sept. 16, 1983).[6]

Courts have held that the same standards govern notification and consent statutes because both types of parental involvement legislation "as a practical matter . . . have the same deterrent effect on a minor having an abortion. . . ." *Indiana Planned Parenthood Affiliates*, 716 F.2d at 1132. Both may result in "similar efforts by parents to block the abortion," whether it be through the legal veto of a consent statute or the threat of punishment for disobedience. *Id. See Bellotti*, 443 U.S. at 647 (because young dependent minors are particularly vulnerable to their parents' efforts to block both an abortion and their access to court, they must have access to a bypass procedure without prior parental knowledge).

Neither do state legislatures evidence any confusion on this issue: Ohio, as well as every state which has passed a parental

6 Courts considered the matter settled before *City of Akron*. *See, e.g., Women's Community Health Center v. Cohen*, 477 F. Supp. 542, 547 (D. Me. 1979).

State attorneys general have also declared unenforceable on the basis of *City of Akron* state notice laws that lack a judicial bypass. Maryland Op. Att'y Gen. No. 85-035 (December 31, 1985); Tennessee Op. Att'y Gen. No. 84-239 (August 7, 1984).

notification law in the last seven years, has included a bypass mechanism.[7] Judicial bypass for all parental involvement legislation, notice as well as consent, has become a settled and accepted principle of American jurisprudence, which the State has put forward no cogent reason to disturb.

III. THE ACT'S JUDICIAL BYPASS MECHANISM IS UNCONSTITUTIONAL UNDER STANDARDS SET BY THIS COURT

The Act's judicial bypass mechanism creates draconian procedural hurdles for a minor attempting to use it.[8] Ohio Rev. Code Ann. § 2151.85 and § 2505.073. She must prove to the juvenile court her maturity or best interests by clear and convincing evidence; she must possess legal knowledge sophisticated enough to choose from among three different petition forms the sole constitutionally correct one; and she must sign her name to that form and prepare for a three week wait for a final ruling, a wait which could take her into the second trimester of pregnancy or make abortion no longer a legally available option to her.

The State asserts that the Act was drafted with "attention to all prior precedents of this Court," J.S. at 16, while simultaneously asserting that review is appropriate on the basis that cer-

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7 Arizona, Ariz. L. 1982, ch. 184 § 2 cited in *Roe v. Corbin*, Civ. 85 No. 2118 Phoenix CLH (D. Ariz. Sept. 23, 1985) (order granting preliminary injunction); Georgia, Ga. Code Ann. §§ 15-11-5, 15-11-110-118 (Supp. 1988); Indiana, Ind. House Enrolled Act No. 1144 (February 25, 1982), reprinted in *Indiana Planned Parenthood Affiliates*, 716 F.2d at 1142; Illinois, Ill. Rev. Stat. ch. 38 §§ 81-65 to 81-70 (Smith Hurd Supp. 1988); Nebraska, Neb. Rev. Stat. § 28-347 (1),(2) (Michie Co. 1985); Nevada, Nev. Rev. Stat. § 442.255 (Michie 1987); West Virginia, W. Va. Code §§ 16-2F-1 to 16-2F-9 (Michie Co. 1985). *See also* Minnesota, Minn. Stat. Ann. § 144.343(2)-(7) (West Supp. 1988) (enacted 1981).

8 As discussed in Point I, *supra*, because the notice provision is unconstitutional, this Court need not reach the issue of the constitutional sufficiency of the bypass in order to affirm the judgment below.

tain bypass procedures found unconstitutional by both lower courts create issues of first impression. J.S. at 23. In fact, the Ohio Act is unique in the extent to which it undermines this Court's clear constitutional directives and it is only the novelty of its constitutional violations that creates "issues of first impression." This is hardly a justification for plenary review, as the State asserts. On the contrary, it is evidence of how far afield the State went in its legislative "innovation" and how clearly correct the Court of Appeals was in rejecting it. The judgment below should be affirmed.

Confidentiality. Rules promulgated by the Clerk of the Ohio Supreme Court to implement the Act require the minor to sign her name to the waiver petition. 854 F.2d at 864; J.S.A. at A-24. As the Court of Appeals found, this requirement runs directly counter to this Court's directive that proceedings to waive parental involvement preserve anonymity. *Bellotti*, 443 U.S. at 644; *Ashcroft*, 462 U.S. at 491 n.16.

The State says that this requirement is constitutional because in *Ashcroft* this Court "approved the confidentiality provisions" of a Missouri law which required a minor to sign her name to a waiver petition. J.S. at 20. This Court did not, however, "approve" those provisions. In fact, it never mentioned them. The Court addressed only the part of the Missouri law which allowed the minor to use her initials on the petition, finding that such a procedure assured confidentiality. *Ashcroft*, 462 U.S. at 491 n.16. The holding of the Court of Appeals for the Eighth Circuit, which this Court affirmed, indicated that the minor could have used her initials to fulfill the "signature" requirement: "we are satisfied," the Eighth Circuit said, "that anonymity is sufficiently protected by these procedures *which do not require the minor to disclose her name*." *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 655 F.2d 848, 860 (8th Cir. 1981) (emphasis added). Clearly, the Ohio Act *does* require the minor to disclose her name and is, therefore, unconstitutional.

Expedition. The State tries to explain away the discrepancy between the length of time the Act allows for judicial bypass

proceedings and the amount of time deemed constitutionally permissible by this Court in *Ashcroft*, 462 U.S. at 491 n.46, by arguing that the lower courts misconstrued the statute. J.S. at 22. This is not, however, an issue meriting plenary review. As this Court has said, " 'we defer to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective states.' " *Frisby v. Schultz*, 108 S. Ct. 2495, 2500 (1988) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985)).

The lower courts' constructions of the Act are plainly reasonable. The State argues that the Act's appellate timetable could be shortened by *including* weekends and holidays in the calculations. The Court of Appeals and the District Court held, however, that the Ohio appellate court rule which states that weekends and holidays are to be *excluded* in calculating appellate deadlines applies to the Act, a fact the State now conveniently ignores. 633 F. Supp. at 1142; J.S.A. at A-92; 854 F.2d at 866 n.8; J.S.A. at A-28, citing Ohio R. App. P. 14(A). Similarly, the State argues that the Court of Appeals erred in not considering that the Ohio courts could shorten the time for good cause. Yet, the State fails to mention that the district court found it unlikely, based on the wide geographical dispersion of the Ohio Courts of Appeals' jurisdiction, that these courts "would be in a position to expedite a hearing at an appellant's request." 633 F. Supp. at 1143; J.S.A. at A-95. Both the foregoing are issues of local law and practice which the lower federal courts are best equipped to judge and which are, therefore, unworthy of plenary review by this Court.[9]

Pleading Requirement. The Act directs the juvenile court that, if a minor alleges only that she is mature enough to decide

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9 The State exaggerates the differences of opinion among the federal courts on this issue. *Glick v. McKay*, 616 F. Supp. at 326 and *American College of Obstetricians and Gynecologists v. Thornburgh*, 656 F. Supp. 879, 887-88 (E.D. Pa. 1987) both struck down statutes with similar timetables. The timetable upheld in *Planned Parenthood Ass'n of the Atlanta Area*, 670 F. Supp. at 990, was 19 days, not 23 days as the State asserts.

about her abortion, it may consider only that issue and if it finds she is immature, it must dismiss her petition. Likewise, if she alleges only that parental notification is not in her best interests, the juvenile court is to consider only that issue, and if it finds against her it must dismiss her petition. Only if the minor alleges both that she is mature *and* that notification is against her best interests may the juvenile court consider whether either or both ground(s) support(s) her petition. Ohio Rev. Code Ann. § 2151.85(C). This scheme is amplified by juvenile court rules which force the minor to choose among three different petition forms: one that contains allegations of maturity; one that contains allegations of best interests; and one that contains both. 854 F.2d at 862, J.S.A. at A-19.

This bizarre statutory/regulatory scheme is in direct conflict with this Court's directive in *Bellotti v. Baird* that a minor is entitled to show that she is mature and that if she fails to satisfy a court that she is mature, "she *must be permitted to show* that an abortion nonetheless would be in her best interests." 443 U.S. at 647 (emphasis added). Ohio has cut off her right to make these alternative showings both by a rule that requires her to elect at the outset which showing she will make and by a statute that forecloses the court from making alternative findings if the minor selects the wrong form.

The State does not deny that this system on its face violates *Bellotti*. In attempted justification it only repeats the two assertions dismissed by the courts below: minors should be able to figure out which form to pick and, even if they cannot, the problem will be solved by their appointed counsel. J.S. at 24. The Court of Appeals dismissed as "absurd" the contention that negotiating the Act's procedural maze, which it characterized as a "trap," was within the capability of any minor mature enough to make the abortion decision. 854 F.2d at 863; J.S.A. at A-20. The District Court dealt soundly with the "counsel" argument:

> First, as a practical matter, having two complaint forms which must be discarded by the minor's lawyer and replaced with the only one which is constitutionally correct

> is nothing short of absurd. Second, the Constitution need not depend on the actions of lawyers to ensure that unconstitutional provisions of state laws are not applied. Finally, there is no guarantee that the minor's lawyer will correct the error, particularly if he or she is unfamiliar with the requirements of *Bellotti II*.

633 F. Supp. at 1138; J.S.A. at A-85.

The State is clearly grasping at straws in an attempt to justify this nonsensical system. The judgment of the Court of Appeals should be affirmed.

Constructive Authorization. The Ohio Act provides that if the juvenile or appellate courts fail to act within the statutory time-frame, an abortion without parental notification is "constructively" authorized. Ohio Rev. Code Ann. §§ 2151.85-(B)(1), 2505.073(A). Yet, no tangible order is made available to the physician to safeguard him or her from the Act's severe criminal penalties. The Court of Appeals joined other courts which have considered this issue in holding that "a physician would be unwilling to proceed under such circumstances. The resulting confusion can only facilitate delay . . . ." 854 F.2d at 868; J.S.A. at A-33. *See also Glick v. McKay*, 616 F. Supp. at 325-26; *Planned Parenthood Ass'n of the Atlanta Area v. Harris*, 691 F. Supp. 1419, 1424 (N.D. Ga. 1988); *Barnes v. Mississippi*, No. J86-0158(W), slip op. at 7 (S.D. Miss. July 2, 1986).

The State asserts that the Court of Appeals indulged in "speculation" both in its view that no tangible authorization would be available and that physicians would be chilled thereby in their willingness to provide abortions. As to the lack of tangible authorization, the fact is that the Act provides for none. It would be speculation, indeed, for the Court of Appeals to have assumed that such authorization would be provided.[10] That the lack of clarity in statutory commands has a chilling effect on

10 The State's argument implicitly concedes that the tangible authorization *should* be provided. The State could easily correct this error by issuing a court rule providing such authorization. *See Planned Parenthood Ass'n of Atlanta*, 691 F. Supp. at 1424.

physicians' willingness to perform abortions which subject them to criminal penalties is not idle speculation, but is a determination firmly grounded in prior holdings of this Court. *See, e.g., Colautti v. Franklin*, 439 U.S. 379, 396 (1979).

This provision leaves minors without a remedy should Ohio courts fail to meet the statutory timetable; and without such a remedy, the bypass proceeding does not effectively guarantee their constitutional privacy right.[11] The Court of Appeals' judgment, therefore, should be affirmed.

Clear and Convincing Evidence. Nothing illustrates the Act's egregious departure from constitutional standards better than its requirement that the juvenile court's findings that a minor is mature or that parental notice would not be in her best interests must be based on "clear and convincing evidence." Ohio Rev. Code Ann. § 2151.85(C). This provision perverts the principles of due process by requiring the individual, rather than the State, to bear the risk of an erroneous deprivation of her constitutional rights. *See Santosky v. Kramer*, 455 U.S 745 (1982).

The State's only argument against the Court of Appeals' judgment is that without a heightened standard of proof, the non-adversarial judicial bypass procedure will "amount to nothing more than a rubber stamped approval of the minor's claim." J.S. at 26. That is wrong as a matter of law. As the Court of Appeals said,

> We reject this argument, as it fails to take into consideration the Supreme Court's admonition that a minor in a bypass procedure must *convince* the juvenile court that she is sufficiently mature or that parental intervention is not in her best interests. Plaintiffs do not argue that the juvenile court in a bypass proceeding is required to act as a mere "rubber stamp" of the minor's decision to abort, and we would not in any instance sanction such a view.

11 The existence of such "constructive order" provisions creates the illusion that a court's inaction will create no harm to minor petitioners, and thereby may heighten the likelihood that busy courts will not meet their timetable.

854 F.2d at 864 n.5; J.S.A. at A-23 n.5 (emphasis in original).[12] This Court should affirm the Court of Appeals' judgment.

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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12 The Eighth Circuit Court of Appeals in *Hodgson* found a bypass mechanism which contained no heightened standard of proof "an effective and independent method for analyzing the situation of the individual pregnant minor—her maturity or immaturity; her no-parent, two-parent or one-parent background; and for determining if it is in her best interests that both parents not be notified." 853 F.2d at 1462.

REPLY

BRIEF

Supreme Court, U.S.
FILED
JAN 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 88-805

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

REPLY ARGUMENTS 1

I. THE ISSUE OF WHETHER THE *BELLOTTI II* BYPASS PROCEDURE IS A CONSTITUTIONALLY REQUIRED COMPONENT OF A PARENTAL NOTIFICATION STATUTE IS PROPERLY BEFORE THIS COURT AND PRESENTS AN ISSUE OF MONUMENTAL IMPORT 2

II. THE JUDICIAL BYPASS PROCEDURE OF THE OHIO PARENTAL NOTIFICATION ACT DOES NOT OFFEND ANY CONSTITUTIONAL STANDARDS SET FORTH BY THIS COURTAND THEREFORE MUST BE REVIEWED 3

III. THE PHYSICIAN NOTIFICATION PROVISION IS NOT UNDULY BURDENSOME AND DOES NOT RENDER THE OHIO PARENTAL NOTIFICATION ACT UNCONSTITUTIONAL 5

CONCLUSION 7

TABLE OF AUTHORITIES

CASES **PAGE**

Akron v. Akron Center for Reproductive Health,
462 U.S. 416 (1983) 5, 6

Akron Center for Reproductive Health v. Slaby,
854 F.2d 852 (6th Cir. 1988) 5

Bellotti v. Baird,
443 U.S. 662 (1979) 2, 3, 4, 6

Brockett v. Spokane Arcades Inc.,
472 U.S. 491 (1985) 3

Colautti v. Franklin,
439 U.S. 379 (1979) 4, 5

Hodgson v. Minnesota,
853 F.2d 1852 (8th Cir. 1988) (*en banc*),
petition for cert. filed, ____ U.S.L.W. ____
(U.S. Jan. 4, 1989)(No. 88-1125) 1

Muskrat v. United States,
219 U.S. 346 (1911) 2

Planned Parenthood Ass'n of Atlanta v. Harris,
670 F. Supp. 971 (N.D. Ga. 1987) 4

Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft,
462 U.S. 476 (1983) 3

United Public Workers v. Mitchell,
330 U.S. 75 (1947) 2

REPLY ARGUMENTS

The Ohio parental notification statute declared unconstitutional by the United States Court of Appeals for the Sixth Circuit, contrary to Appellees' ("Plaintiffs") assertions, clearly presents this Court with a justiciable controversy that warrants plenary review. Moreover, Plaintiffs' strained application of prior precedents of this Court should not be utilized to undermine the need for judicial review in this volatile and unsettled area of law concerning parental involvement in a minor's decision to obtain an abortion.

The Plaintiffs do not dispute the fact that thirty-two (32) states have enacted legislation which provides for parental involvement in the abortion decision of a minor. Of these thirty-two (32) only five (5) statutes have survived constitutional challenge in federal courts. Motion to Affirm at 3 n.2 ("M.A."); and Jurisdictional Statement at 15 n.4 ("J.S."). The five states include Minnesota whose two-parent notification statute was found constitutional by the United States Court of Appeals for the Eighth Circuit, and is currently pending before this Court on a petition for certiorari. *Hodgson v. Minnesota*, 853 F.2d 1852 (8th Cir. 1988) (*en banc*), *petition for cert. filed,* ____ U.S.L.W. ____ (U.S. Jan 4, 1989)(No. 88-1125).

This Court is presented with a facial challenge to a state statute that has been declared unconstitutional. Plaintiffs accuse the State of Ohio, along with other states which have had legislation struck down by the courts, of disregarding the mandates of this Court, and the body of clear guidelines provided to the states. M.A. at 3. Plaintiffs' argument is belied by the thwarted good faith efforts of multiple state legislatures and the nationwide protracted litigation of major proportions that has resulted. See, M.A., nn.1 and 2; and J.S. nn. 3, 4 and 5. If the guidelines that Plaintiffs assert are "clear", arguably there would be no need for litigation in this area. However, the guidelines from the courts in this area are far from clear and require this Court's plenary review.

I. THE ISSUE OF WHETHER THE *BELLOTTI II* BYPASS PROCEDURE IS A CONSTITUTIONALLY REQUIRED COMPONENT OF A PARENTAL NOTIFICATION STATUTE IS PROPERLY BEFORE THIS COURT AND PRESENTS AN ISSUE OF MONUMENTAL IMPORT.

Contrary to Plaintiffs' contention, this case clearly presents this Court with the issue of the application of the *Bellotti v. Baird*, 443 U.S. 662 (1979) ("*Bellotti II*") bypass procedure to the context of a notification statute. Plaintiffs correctly state that this Court has long eschewed granting review for the purpose of issuing advisory opinions. *Muskrat v. United States*, 219 U.S. 346, 362 (1911). However, this matter presents neither an abstract nor a hypothetical question, but rather is a ripe controversy between the parties that in accordance with long established principle warrants this Court's review. *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947). Plaintiffs' contention that review is not warranted is undermined by the fact that lower courts have consistently addressed the broader question of whether a bypass procedure is required in a notification context prior to analyzing whether the challenged statute conforms with *Bellotti II*. J.S. at 17-18.

In the event this Court finds that *Bellotti II* bypass requirements are not mandated in the notice context, this Court need not examine the Ohio statute under said standards. Moreover, far from uniformity of opinion, the plethora of lower court activity on this issue, points out the fallacy of Plaintiffs' position. J.S. at 14-16 nn. 2, 3, and 5. It is inevitable that litigation on this issue will continue until this Court provides state legislatures with guidance on whether a judicial bypass procedure is constitutionally mandated in a notification statute.

II. THE JUDICIAL BYPASS PROCEDURE OF THE OHIO PARENTAL NOTIFICATION ACT DOES NOT OFFEND ANY CONSTITUTIONAL STANDARDS SET FORTH BY THIS COURT AND THEREFORE MUST BE REVIEWED.

Plaintiffs contend that Ohio's bypass procedure "undermines this Court's clear constitutional directives.... " M.A. at 9. This contention is plainly unsupported.

First, Plaintiffs assert that the Ohio Act is unconstitutional because it requires a minor to disclose her name. M.A. at 9. In support of this proposition, Plaintiffs rely on *Bellotti II* and *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983) ("*Ashcroft*"). Neither of these cases, however, lend credence to their argument. *Bellotti II* merely sets forth the general rule that a bypass proceeding must preserve a minor's confidentiality. 443 U.S. at 648. *Ashcroft* provides that the confidentiality requirement is satisfied by permitting the minor to use her initials on the complaint form, 462 U.S. at 497 n. 16, but in no way does *Ashcroft* categorically prohibit requiring a minor to disclose her name. Thus, Plaintiffs' suggestion that this issue has been settled is erroneous.

Second, Plaintiffs argue that Ohio's expedition provisions do not merit review because deference on this issue should be given to the lower federal courts in accordance with *Brockett v. Spokane Arcades Inc.*, 472 U.S. 491 (1985). M.A. at 10. While *Brockett* noted that this Court generally defers to the lower federal courts' construction of a state statute, the *Brockett* opinion also stated that this rule is not ironclad and that this Court "surely has the authority to differ with the lower federal courts as to the meaning of a state statute." Id. at 500. Furthermore, what is ironclad is the duty of the federal courts to interpret a state statute in a manner that will avoid a danger of unconstitutionality. *Ashcroft*, 462 U.S. at 493. Plaintiffs fail to acknowledge this principle in arguing that the lower courts' construction of Ohio's time

requirements was "reasonable".[1] M.A. at 10.

Third, Plaintiffs contend that Ohio's pleading requirements are in direct conflict with *Bellotti II* and that the State of Ohio does not dispute this notion. Plaintiffs have misconstrued both *Bellotti II* and the State of Ohio's position on this issue. *Bellotti II* merely requires a state to allow a minor to show either: "(1) that she is mature enough and well enough informed to make her own abortion decision in consultation with her physician independent of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests." *Bellotti II,* 433 U.S. at 643-44. There is no question that Ohio's parental notification statute affords a minor this right. The only issue here is whether the pleading framework is so complex as to cast an undue burden on that right. The State of Ohio's position has consistently been that the pleading framework is a logical application of *Bellotti II* which should be given proper deference by the courts.

Plaintiffs next rely on *Colautti v. Franklin,* 439 U.S. 379 (1979) ("*Colautti*") to challenge Ohio's constructive authorization provision. Plaintiffs contend that it is firmly grounded in prior holdings of this Court that a lack of clarity in statutory commands has a chilling effect on physicians' willingness to perform abortions. M.A. at 12-13. Based on this authority, Plaintiffs state that the United States Court of Appeals for the Sixth Circuit was justified in concluding that Ohio's constructive authorization provision would render physicians unwilling to perform abortions. M.A. at 12.

In *Colautti,* the Court struck down a criminal statute which required physicians to make a determination of viability before performing an abortion. The Court reasoned that such a requirement would have a chilling effect on the willingness

[1] Contrary to Plaintiffs' suggestion, the State of Ohio has not exaggerated the differences of opinion among the federal courts on the issue of expedition. M.A. at 10 n. 9. The State was correct in asserting that *Planned Parenthood Ass'n of Atlanta v. Harris,* 670 F. Supp. 971, 989 (N.D. Ga. 1987) considered the constitutionality of a 23-day bypass procedure.

of physicians to perform abortions especially since medical experts often disagree on when viability occurs. 439 U.S. at 396-97. Clearly, *Colautti* has no application to the instant case since Ohio's constructive authorization provision does not impose criminal penalties for subjective medical judgments. Furthermore, there is no authority from this Court which would suggest that Ohio's constructive authorization provision is constitutionally infirm.

Finally, Plaintiffs argue that the burden of proof issue does not warrant review. Plaintiffs merely cite the opinion of the United States Court of Appeals for the Sixth Circuit as authority for this argument. M.A. at 13. However, the lower court's analysis is flawed by its application of "general rules" governing the constitutionality of the standard of proof in adversarial proceedings to the nonadversarial context presented by this statute. *Akron Center for Reproductive Health v. Slaby,* 854 F.2d 852, 863-64 (6th Cir. 1988). Thus, Ohio's burden of proof requirement is one that warrants full review by this Court.

III. THE PHYSICIAN NOTIFICATION PROVISION IS NOT UNDULY BURDENSOME AND DOES NOT RENDER THE OHIO PARENTAL NOTIFICATION ACT UNCONSTITUTIONAL.

Plaintiffs cite *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983) ("*Akron I*") in arguing that Ohio's physician notification provision is unconstitutional. Under *Akron I,* "it is unreasonable for a State to insist that only a physician is competent to provide the information and counseling relevant to informed consent." *Id.* at 449. This ruling, however, does not foreclose the issue of whether a state can require that a physician notify a minor's parents of her abortion decision.

The ordinance struck down in *Akron I* charged physicians with the responsibility of ensuring that a woman contemplating an abortion made an informed choice. *Id.* at 446. The ordinance applied to all women seeking an abortion. The physician notification provision challenged here only

extends to the abortion decision of minors. It is well established that constitutional guarantees for minors may be adjusted to account for children's vulnerability and their needs for concern, sympathy and paternal attention. *Bellotti II*, 443 U.S. at 635.

Unlike *Akron I*, the state interest advanced here is not to ensure that a woman's consent to an abortion is informed and unpressured. 462 U.S. at 448. Rather, the state interest is to facilitate parental involvement and the medical judgment of the physician. These radical differences undercut Plaintiffs' contention that the constitutionality of Ohio's parental notification requirement is foreclosed by *Akron I*. Moreover, even in the *Akron I* context of informed consent this Court clarified that "we do not imply that a physician may abdicate his essential role as the person ultimately responsible for the medical aspects of the decision to perform the abortion." *Id.* (footnote omitted).

Akron I does not directly address the role a physician can constitutionally play in accordance with a notification statute. Nor did this Court's decision in *Akron I* prohibit direct physician involvement in the communication between physician and the parent of a minor child who is making an important and stressful abortion decision. Accordingly, the parental notification issue warrants plenary review by this Court.

CONCLUSION

This Court should note probable jurisdiction.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 88-805

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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TABLE OF CONTENTS

	Pages
TABLE OF CASES AND AUTHORITIES.....	ii
STATEMENT OF INTEREST.....	1
SUMMARY OF ARGUMENT.....	4
ARGUMENT.....	5
I. THIS COURT SHOULD REVIEW THE SIXTH CIRCUIT'S DECISION IN ORDER TO PROVIDE FURTHER CLARIFICATION OF THE CONSTITUTIONAL LIMITS UPON A STATE'S INTEREST IN ENCOURAGING PARENTAL INVOLVEMENT IN A MINOR'S DECISION TO HAVE AN ABORTION.....	5
A. THE STATES AND THE JUDICIARY WOULD BENEFIT FROM FURTHER ELUCIDATION OF THE PARAMETERS OF A STATE'S ABILITY TO CONSTITUTIONALLY ENCOURAGE PARENTAL INVOLVEMENT IN A MINOR'S DECISION TO HAVE AN ABORTION.....	6
B. THE STATES ARE BURDENED BY THE FEDERAL JUDICIARY'S RELUCTANCE TO ALLOW THE STATES TO DEVISE STATUTES THAT BEST ACCOMMODATE COMPETING INTERESTS WITHIN THE CONTEXT OF EACH STATE'S CIRCUMSTANCES.....	21
CONCLUSION.....	29

TABLE OF CASES AND AUTHORITIES

Cases

	Pages
Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198 (8th Cir. 1981), aff'd in part, rev'd in part, 462 U.S. 416 (1983).....	18
Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988).....	15
American College of Obstetricians v. Thornburgh, 737 F.2d 283 (3rd Cir. 1984), aff'd, 476 U.S. 747, (1986).....	24
Bellotti v. Baird, 443 U.S. 622 (1979).....	passim
City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1982).....	passim
City of New Orleans v. Dukes, 427 U.S. 297, 302 (1976).....	22
Glick v. McKay, 616 F. Supp. 322 (D. Nev. 1985), appeal docketed, No. 85-2335 (9th Cir. Aug. 6, 1985).....	passim
H.L. v. Matheson, 450 U.S. 398 (1981).....	passim

Pages

Indiana Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127 (7th Cir. 1983).... 15

Mercantile National Bank v. Langdeau, 372 U.S. 555 (1963).... 23

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).... 22

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973)..... 22

Planned Parenthood v. Danforth, 428 U.S. 52 (1976)..... passim

Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1982)..... passim

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, (1986)..... 20, 23

Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir. 1985), aff'd, ___ U.S. ___, 108 S. Ct. 479 (1987)..... 15, 21

Constitutions

Nev. Const. art. 4, { 2..... 28

Statutes

Nev. Rev. Stat. { 129.030 (1985)..... 11

Nev. Rev. Stat. { 442.255 (1985)..... 2, 3

Nev. Rev. Stat. { 442.2555 (1985)..... 2, 3

Pages

Other Authorities

Note, Constitutional Law: The Minor's Right to Consent to Abortion: How Far is Oklahoma from Akron?, 37 Okla. L. Rev. 780 (1984)..... 12

Note, Minors' Right of Privacy, 8 J. Juv. L. 170 (1984)..... 23

Registrar of Vital Statistics, Nevada Human Resources Department, Nevada Vital Statistics Report 1983-1984 (1986)..... 8

Scott, Legal and Ethical Issues in Counseling Pregnant Adolescents, in Adolescent Abortion 118 (G. Melton ed. 1986)..... 8

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On Appeal from the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATES OF NEVADA, ARIZONA, PENNSYLVANIA, AND ILLINOIS, AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

STATEMENT OF INTEREST

Nevada, as well as Arizona, Pennsylvania, and Illinois join their sister state Ohio in

urging this Court to review the decision of the United States Court of Appeals for the Sixth Circuit in the case sub judice.

Nevada's parental notification provisions, see, e.g., Nev. Rev. Stat. {{ 442.255, .2555 (1985), are, like the Ohio statute, a legislative attempt to accommodate a child's constitutional right to privacy, Planned Parenthood v. Danforth, 428 U.S. 52, 74-75 (1976) (Danforth), and the interest of the state in encouraging parental involvement in one of the most serious decisions a young child may make. H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti II).

Although the amicus states' involvement provisions are different from Ohio's, the states' statutes designate the judiciary as the independent decision-maker to determine whether parental involvement is in the minor's best interest. (Nevada's statute is

dissimilar in that it provides first for an informal interview between the judge and the minor; if the minor's request for waiver of parental notification is denied by the judge after the interview, the minor is given the opportunity to file a petition, in a process similar to Ohio's. Nev. Rev. Stat. {{ 442.255, .2555 (1985).)[1]

The federal judiciary enjoined enforcement of both the Ohio and Nevada statute prior to the statutes' operative dates. Glick v. McKay, 616 F. Supp. 322 (D. Nev. 1985), appeal docketed, No. 85-2335 (9th Cir. Aug. 6, 1985).[2] Since Nevada and the other states

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1. The full text of Nevada's provisions is set forth in the Appendix at 1.

2. The United States Court of Appeals for the Ninth Circuit has twice vacated submission of Nevada's appeal from the district court's preliminary injunction pending this Court's further pronouncements on parental notification provisions. Glick v. McKay, 616 F. Supp. 322, (D. Nev. 1985), appeal docketed, No. 85-2335 (9th Cir. Aug. 6, 1985) (order vacating submission March 13, 1987).

find themselves in the same impasse as Ohio, they have an interest in seeing this issue resolved.

SUMMARY OF ARGUMENT

This Court should review the Sixth Circuit Court of Appeal's decision. The states need further elucidation of the constitutional status of the minor's right to privacy vis-a-vis the state's interest in encouraging, through a mere parental notice requirement, parental involvement in a minor's decision to have an abortion. The interests of the state in encouraging parental involvement have been recognized, but those interests have never been squarely juxtaposed against the interest of a minor in avoiding parental notification. The states and the judiciary need further guidance from this Court.

This need, although compelling, is not the sole reason for Nevada's interest in this case. Both Ohio's and Nevada's statutes were enjoined prior to the statutes' operative

dates. Nevada and Ohio have been hampered in their attempts to accommodate several interests, for it appears that the Ohio and Nevada statutes were rejected because they were not identical to those statutes that had previously received this Court's imprimatur. The lower courts have failed to pay deference to the unique status of each state. They would have all statutes be a mirror image of the Missouri statute that this Court approved in Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1982). Further federal judicial entanglement in the states' attempts to reconcile different interests will be obviated by a resolution of this appeal.

ARGUMENT

I. THIS COURT SHOULD REVIEW THE SIXTH CIRCUIT'S DECISION IN ORDER TO PROVIDE FURTHER CLARIFICATION OF THE CONSTITUTIONAL LIMITS UPON A STATE'S INTEREST IN ENCOURAGING PARENTAL INVOLVEMENT IN A MINOR'S DECISION TO HAVE AN ABORTION.

The Sixth Circuit's decision should be reviewed for two reasons. First, the states

and the judiciary would benefit from further guidance as to the parameters of a state's right to encourage parental involvement in a minor's decision to have an abortion. Second, Ohio is not alone in the dilemma caused by judicial decisions enjoining state statutes prior to the statutes becoming effective. The states have been discouraged from experimenting with legislation to accommodate competing interests by the judicial reluctance to sanction a statute that is not identical to statutes that have previously received the approval of this Court.

A. THE STATES AND THE JUDICIARY WOULD BENEFIT FROM FURTHER ELUCIDATION OF THE PARAMETERS OF A STATE'S ABILITY TO CONSTITUTIONALLY ENCOURAGE PARENTAL INVOLVEMENT IN A MINOR'S DECISION TO HAVE AN ABORTION.

The states have been hampered in their attempts to constitutionally accommodate their interest in ensuring that a minor's decision to terminate her pregnancy is well-informed

and reasoned. Although this Court has frequently reviewed legislative attempts to ensure that a minor makes a knowledgeable decision about an abortion, see Planned Parenthood v. Danforth, 428 U.S 52 (1976); Bellotti v. Baird, 443 U.S. 622, 639 (1979) (plurality opinion) (Bellotti II); H.L. v. Matheson, 450 U.S. 398 (1981); City of Akron v. Akron Center for Reproductive Health, 462 U.S 416 (1982) (Akron I); Planned Parenthood Ass'n v. Ashcroft, 462 U.S 476 (1982), the approach taken by the Court has been far from single-minded. Bellotti II and Ashcroft were pluralities, while Danforth was a five to four decision.

The states need further elucidation of the constitutional status of the minor's right to privacy vis-a-vis the state's interest in encouraging, through a mere notice requirement, parental involvement in a minor's decision to have an abortion. This case

presents the opportunity for resolution of the questions that remain unanswered by previous pronouncements of this Court. See generally, Scott, Legal and Ethical Issues in Counseling Pregnant Adolescents, in Adolescent Abortion, 118-19 (G. Melton ed. 1986) (discussing the uncertainties of Supreme Court decisions).

The issue should be resolved finally. The states' interest in this issue is compelling. For instance, in 1984, five hundred and seventy-three children ranging in age from ten to seventeen had abortions in Nevada. Registrar of Vital Statistics, Nevada Human Resources Department, Nevada Vital Statistics Report 1983-1984 38-47 (1986). While the figure may seem small in comparison to other states, this figure represents approximately ten percent of all abortions performed in Nevada in that year. Id. These children and their physicians were not required to notify the child's parents prior to the abortion.

Nevada, like thirty-two other states, has enacted a statute that encourages parental involvement in a minor's decision to have an abortion. Nevada and thirteen other states require only parental notification, not consent.[3] By choosing to require only parental notification rather than consent, Nevada recognized the minor's interest in making the abortion decision herself. Planned Parenthood v. Danforth, 428 U.S 52, 74-75 (1976). But Nevada, like other states, sought to protect several other interests.

Nevada sought to encourage parental involvement in a minor's decision to have an abortion. The interest of the states in encouraging parental involvement in the important decision whether to terminate a

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3. A complete list of the states and citations to the relevant statutes are set forth in the Appellant's Jurisdictional Statement at 14. Citations to the brief filed by Appellants appear as "App. Br. ___."

pregnancy is based upon constitutionally permissible grounds. H.L. v. Matheson, 450 U.S. 398, 409 (1981); Bellotti v Baird, 443 U.S. 622, 634 (1979) (plurality opinion) (Bellotti II).

Nevada also recognized the important role and interest that parents have in the care and raising of their children. See H.L. v. Matheson, 450 U.S. at 410. Our society grants parents the constitutional right, within reason, to direct the rearing of their children. Bellotti II, 443 U.S. at 639 n.18 (plurality opinion). Encouraging parental involvement in the abortion decision recognizes the parents' interest in the development of their children into well-adjusted, mature adults.

Protection of the minor and the physician from uninformed medical decisions is also a constitutionally cognizable interest that was recognized by Nevada in enacting this legis-

lation. Parents are best able to supply essential medical and other information to a physician contemplating treatment of a child. H.L. v. Matheson, 450 U.S. at 411. Minors simply may not be able to recall or relate important histological information that would affect an abortion procedure or any other surgical operation.[4]

While these state interests have been recognized by this Court, they have never been squarely juxtaposed against the interest of the minor in avoiding mere parental notification. City of Akron v. Akron Center for Reproductive Health, 462 U.S 416, 469 n.12 (1982) (Akron I) (O'Connor, J., dissenting). A majority of this Court has never held that a minor's right to privacy is affected by a

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4. In Nevada, a physician must receive consent from the parents of a minor whenever the minor seeks medical treatment, unless the minor is married, living apart from the parents, is a mother, or has borne a child, or there is a medical emergency. Nev. Rev. Stat. { 129.030 (1985).

notice provision in the same manner as a consent provision. The subject continues to be open to debate. See, e.g., Note, Constitutional Law: The Minor's Right to Consent to Abortion: How Far is Oklahoma from Akron?, 37 Okla. L. Rev. 780, 799, 805 (1984).

Thus far, the determinative factor in this Court's decisions regarding minors' abortion rights has been the unreasonable burden placed upon a minor's right to privacy if a third-party has veto authority over that decision. For instance, in Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (Danforth), this Court opined that "the State may not impose a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for an abortion of an unmarried minor." Id. at 74. In Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion) (Bellotti II) this Court expounded upon Danforth by ruling that "if the state decides to require a

pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion may be obtained." Id. at 643 (footnote omitted).

Language in Bellotti II that "every minor must have the opportunity--if she so desires--to go directly to a court without first consulting or notifying her parents," id. at 647, has been viewed by some as requiring that a minor must also be given an opportunity to avoid parental notification even if parental consent is not required. However, the Massachussetts statute in Bellotti II was not a mere parental notification statute like Nevada's and Ohio's. The Massachussetts statute also required parental or judicial consent for the abortion.

Because the parents or the judiciary could absolutely prohibit the abortion, it was

requiring too much to compel the minor to notify her parents if she were going to seek judicial consent for the procedure. If the minor were required to notify her parents, she might have to overcome two obstacles: her parents, who might obstruct access to the court, and the court itself, which would be the ultimate arbiter of her decision to have an abortion. Under those circumstances, the state could not impose an additional condition or burden upon initial access to the court.

Neither Danforth nor Bellotti II "determine[d] the constitutionality of a statute which does no more than require notice to the parents without affording them or any other third party an absolute veto." Bellotti II, 443 U.S. at 654 n.1.

Similarly, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1982) (Akron I), and Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1982), did not

determine the effect of a mere parental notification statute. In Akron I, a majority of the Court reiterated that blanket parental consent provisions are not constitutional. Akron I, 463 U.S. at 439. This Court found that the Akron I ordinances did not create a constitutionally adequate alternative to parental consent. On the other hand, Missouri's statute was facially constitutional. Ashcroft, 462 U.S. at 476.

The lower courts have opined that this Court's decisions, specifically Akron I, requires them to apply the same constitutional analysis to both consent and parental notification provisions. Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988); Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir. 1985) aff'd mem., 108 S. Ct. 479 (1987); Indiana Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127 (7th Cir. 1983); see also Glick v. McKay, 616

F. Supp. 322, 324-25 (D. Nev. 1985), appeal docketed, No. 85-2335 (9th Cir. Aug. 6, 1985). In reaching that conclusion, the courts have taken generalized statements and transformed them into authoritative holdings.

This Court stated in Akron I that a state's interest in encouraging parental involvement "must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement." Akron I, 462 U.S. at 427-28 n.10. Further, this Court noted that a procedure whereby parents would be notified when a minor filed a petition seeking court consent for an abortion would be unconstitutional as applied to a mature minor. Id. at 441 n.31. These statements were not necessary for the resolution of the issues which were presented and should not be relied upon as authority for the contention that

notification statutes must be treated identically to consent statutes.

First, the statement that a procedure would be unconstitutional if the parents of a minor were notified when she filed a petition seeking court approval of the abortion is merely a reaffirmation of the Court's decision in Bellotti II: If a state requires parental or judicial consent to an abortion, thereby creating the possibility of a third-party veto of the decision, the state can not impose an additional condition to judicial access by requiring the minor to inform her parents of her intent to seek judicial consent.

Similarly, the footnoted statement that a minor had to be able to avoid "parental involvement" was not necessary to the Akron I decision, nor can it be taken out of the context and the posture of the case. Because this Court was addressing only the issue of a parental consent statute, its casual use of

the phrase "parental involvement" cannot be interpreted beyond the confines of the facts and issues being considered. Indeed, although this Court recognized that such a notification provision of the Akron I ordinance was previously upheld by the Sixth Circuit Court of Appeals, Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1206 (6th Cir. 1981), aff'd in part, rev'd in part, 462 U.S. 416 (1983), it did not comment on the validity of that ruling.[5]

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5. Justice Stevens joined the majority in Akron in finding that the alternatives to parental consent were constitutionally insufficient. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1982) (Akron I). However, Justice Stevens dissented from the majority opinion in Danforth that held blanket consent provisions unconstitutional. 428 U.S. 52, 101. Similarly, he concurred specifically in H.L. v. Matheson, 450 U.S 398, 420 (1981), and opined that the Court should address the issues posed by parental notification statutes and find that such statutes are constitutional even as applied to mature minors. His agreement with the majority in Akron I cannot be presumed to be an agreement with Justice Powell's statements regarding parental involvement.

The only time that this Court has had occasion to address a notification statute was in H.L. v. Matheson, 450 U.S. 398 (1981). In that case, a Utah statute requiring mere parental notification was held to be constitutional as applied to an unemancipated minor who was living with and dependent upon her a state must provide alternatives to parental notification." Id. at 413 n.22. That decision has still not been made.

Because the issue has not been resolved by this Court, the judiciary, as well as the states, treads lightly when trying to extrapolate constrictions upon notification provisions from previous Supreme Court decisions regarding consent provisions.

Nevada is not alone in its desire for further guidance from this Court. The uncertainty as to how this Court will view a parental notification statute may have motivated the United States Court of Appeals

for the Ninth Circuit to delay its ruling on Nevada's appeal.[6] The Ninth Circuit heard oral argument on Nevada's appeal from the issuance of a preliminary injunction enjoining Nevada's parental notification statute on March 13, 1986. The Ninth Circuit has twice vacated submission of the case pending further clarification from this Court. Glick v. McKay, 616 F. Supp. 322 (D. Nev. 1985), appeal docketed, No. 85-2335 (9th Cir. Aug. 6, 1985) (order vacating submission Apr. 16, 1986) (awaiting this Court's decision in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, (1986); id. (order vacating submission March 13, 1987)

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6. Nevada's appeal from the issuance of the preliminary injunction requested that the Ninth Circuit decide the case on the merits rather than on the appropriateness of the injunction. The fact that the Ninth Circuit is waiting for this Court's pronouncements may well point toward a decision on the merits. A decision on the merits would be appropriate. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, (1986).

(awaiting this Court's decision in Hartigan v. Zbaraz, ___ U.S. ___, 108 S. Ct. 479 (1987)). Until the consequences of parental notification are fully identified and analyzed, the states and federal judiciary remain bereft of guidance that is a necessary prerequisite to effective accommodation of potentially competing interests.

B. THE STATES ARE BURDENED BY THE FEDERAL JUDICIARY'S RELUCTANCE TO ALLOW THE STATES TO DEVISE STATUTES THAT BEST ACCOMMODATE COMPETING INTERESTS WITHIN THE CONTEXT OF EACH STATE'S CIRCUMSTANCES.

The desire for further guidance, although significant, is not the sole reason for the amicus states' interest in this case. The states have fundamental comity concerns with the federal judiciary's apparent willingness to enjoin statutes prior to the statutes becoming effective.

The judgment of the Sixth Circuit prevents Ohio from giving effect to legislation that was duly enacted by the Ohio legislature, just

as other decisions have prevented other states from giving effect to their legislation.[7] See City of New Orleans v. Dukes, 427 U.S. 297, 302 (1976). This Court has always been mindful of the hardships that accompany delayed review. Its sensitivity in this area has consistenly been heightened when, as here, the delay leaves unsettled the appropriate course of future state action, poses the potential for the unnecessary expenditure of state resources or protracted interference with legislative programs, or leaves important federal questions unresolved. See, e.g., City of New Orleans v. Dukes, supra, 427 U.S. 297; Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414

7. A complete list of statutes that have been enjoined or found to be unconstitutional is found in the Appellant's Jurisdictional Statement at 15 n. 5.

U.S. 156 (1973); Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963).

The abortion issue, perhaps more than any other in recent history, evokes emotion and disagreement even among jurists.[8] It cannot be denied that "many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy." Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 793 (1986) (White, J., dissenting).

The highly emotional nature of the abortion controversy perhaps predisposes jurists (and others) to view the states' legislative attempts in an almost ritualistic manner, without considering the ramifications of

8. "Part of the problem is that both sides in this dispute rely on prior cases such as Bellotti in which no majority opinion was enunciated." Note, Minors' Right of Privacy, 8 J. Juv. L. 170, 177 (1984).

decisions enjoining the legislation. The states which have attempted to legislate in a value neutral posture are affected by the judicial decisions as intimately as those which clearly legislate with an anti-abortion value preference. "[S]weeping rejections of legislative enactments often result from a tendency to generalize the holdings of cases and drive those generalizations to an extreme which, while perhaps exhibiting conceptual purity, belies the emptiness of logical constructs devoid of empirical content." American College of Obstetricians v. Thornburgh, 737 F.2d 283, 317 (3rd Cir. 1984) (Adams, J., sur denial of petition for rehearing), aff'd, 476 U.S. 747 (1986).

States have responded to the complex issue of a minor's ability to make an informed abortion decision in a myriad of fashions, each of which is designed in light of the state's geographical, demographic, and

sociological status.[9] The variations are as diverse as the states. The judiciary must recognize that each state's circumstances are unique and must allow the states to legislate accordingly. As of yet, the judiciary does not seem to be willing to allow any statute to be enforced unless it is identical to the Missouri statute found to be constitutional in Ashcroft.

For instance, Nevada's parental notification provision and its by-pass provisions are geared toward the state's primarily rural nature. The enjoined Nevada legislation provides two mechanisms by which an unemancipated or unmarried minor woman may seek a waiver of parental notification. A minor may first request that a state district court judge issue an order waiving parental notification. If the minor makes such a

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9. See App. Br. at 14-15 for a list of statutes and their content.

request, the judge must interview the woman at the earliest practicable time, which must not be more than two judicial days after the request is received. If the judge determines from any information provided by the adolescent that she is mature enough to make an intelligent and informed decision concerning the abortion, or that she is financially independent and is emancipated, or that notice to her parents would be detrimental to her best interest, the judge has a nondiscretionary duty to issue an order authorizing the abortion without parental notification within one day after the interview. If the judge does not issue an order, the waiver is deemed to be granted.

This interview mechanism is geared to the geographical and demographic status of Nevada. The state encompasses 110,561 square miles, however, all but two of the seventeen counties

have fewer than 50,000 inhabitants. There are very few services for juveniles. It is appropriate, in the context of this unique situation, that the Legislature authorized state district court judges to conduct an informal interview with the adolescent for the purpose of determining whether the facts and circumstances of that minor's pregnancy are such that parental notification should be waived.

As far as Nevada conditions are concerned, the interview process is the most straightforward, clear, and simple procedure that can be imagined. A district court exists in every county. It is invariably located in a courthouse whose location is a matter of common public knowledge. State court judges have secretaries who receive mail, answer the telephone, and make appointments for the judges. Yet, the United States District Court

for the District of Nevada cavalierly opined that "[i]t is difficult to believe that a district court could conduct its business in this manner." Glick v. McKay, 616 F. Supp. 322 (D. Nev. 1985), appeal docketed, No. 85-2335 (9th Cir. Aug. 6, 1985).

Nevada, as well as other states, has been frustrated by approaches such as this in its attempt to experiment with legislation that affords significant weight to the interest of the state in ensuring that the pregnant minor makes an informed decision about an abortion.

The frustration of efforts is particularly egregious in Nevada. Nevada's Legislature meets biennially. Nev. Const. art. 4, { 2. When statutes are challenged and enjoined after the Legislature adjourns, but prior to their operative date (as in this case), Nevada must wait another two years to amend the statute. This has the effect of preventing

the state from giving effect to a statute enacted by the representatives of the people. Nevada's parental notification provisions have been enjoined for four years, even though there has been no determination that the provisions are unconstitutional. Review of the Sixth Circuit's decision is appropriate not only to protect Ohio from the extraordinary burden that an erroneous decision imposes, but also to ensure that other states are not subjected to similar consequences.

CONCLUSION

The states need further guidance from this Court as to the constitutional parameters of a minor's right to make abortion decisions herself. Otherwise, disservice is done to the state's significant interests in ensuring that a minor's decision to have an abortion is one that is based upon a full understanding and recognition of the permanent implications such

a decision will have on the rest of the minor's life.

Respectfully submitted,

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APPENDIX

442.255 Notice of custodial parent or guardian; request for authorization for abortion; rules of civil procedure inapplicable.

1. Unless in the judgment of the attending physician an abortion is immediately necessary to preserve the patient's life or health or an abortion is authorized pursuant to subsection 2 or NRS 442.2555, a physician shall not knowingly perform or induce an abortion upon an unmarried and unemancipated woman who is under the age of 18 years unless a custodial parent or guardian of the woman is personally notified before the abortion. If the custodial parent or guardian cannot be so notified after a reasonable effort, the physician shall delay performing the abortion until he has notified the parent or guardian by certified mail at his last known address.

2. An unmarried or unemancipated woman who is under the age of 18 years may request a district court to issue an order authorizing an abortion. If so requested, the court shall interview the woman at the earliest practicable time, which must be not more than 2 judicial days after the request is made. If the court determines, from any information provided by the woman and any other evidence that the court may require that:

(a) She is mature enough to make an intelligent and informed decision concerning the abortion;

(b) She is financially independent or is emancipated; or

(c) The notice required by subsection 1 would be detrimental to her best interests, the court shall issue an order within 1 judicial day after the interview authorizing a

physician to perform the abortion in accordance with the provisions of NRS 442.240 to 442.270, inclusive.

3. If the court does not find sufficient grounds to authorize a physician to perform the abortion, it shall enter an order to that effect within 1 judicial day after the interview. If the court does not enter an order either authorizing or denying the performance of the abortion within 1 judicial day after the interview, authorization shall be deemed to have been granted.

4. The court shall take the necessary steps to ensure that the interview and any other proceedings held pursuant to this subsection or NRS 442.2555 are confidential. The rules of civil procedure do not apply to any action taken pursuant to this subsection.

(Added to NRS by 1981, 1163; A 1985, 2309)

442.2555 Procedure if district court denies request for authorization for abortion: Petition; hearing on merits; appeal.

1. If the order is denied pursuant to NRS 442.255, the court shall, upon request by the minor if it appears that she is unable to employ counsel, appoint an attorney to represent her in the preparation of a petition, a hearing on the merits of the petition, and on an appeal, if necessary. The compensation and expenses of the attorney are a charge against the county as provided in the following schedule:

(a) For consultation, research and other time reasonably spent on the matter, except court appearances, $20 per hour.

(b) For court appearances, $30 per hour.

2. The petition must set forth the initials of the minor, the age of the minor, the estimated number of weeks elapsed from the probable time of conception, and whether maturity, emancipation, notification detrimental to the minor's best interests or a combination thereof are relied upon in avoidance of the notification required by NRS 442.255. The petition must be initialed by the minor.

3. A hearing on the merits of the petition, on the record, must be held as soon as possible and within 5 judicial days after the filing of the petition. At the hearing the court shall hear evidence relating to:

(a) The minor's emotional development, maturity, intellect and understanding;

(b) The minor's degree of financial independence and degree of emancipation from parental authority;

(c) The minor's best interests relative to parental involvement in the decision whether to undergo an abortion; and

(d) Any other evidence that the court may find useful in determining whether the minor is entitle to avoid parental notification.

4. In the decree, the court shall, for good cause:

(a) Grant the petition, and give judicial authorization to permit a physician to perform an abortion without the notification required in NRS 442.255; or

(b) Deny the petition, setting forth the grounds on which the petition is denied.

5. An appeal from an order issued under subsection 4 may be taken to the supreme court, which shall suspend the Nevada Rules of Appellate Procedure pursuant to N.R.A.P. 2 to provide for an expedited appeal. The notice of intent to appeal must be given within 1 judicial day after the issuance of the order. The record on appeal must be perfected within 5 judicial days after the filing of the notice of appeal and transmitted to the supreme court. The court, shall, by court order or rule, provide for a confidential and expedited appellate review of cases appealed under this section.

(Added to NRS by 1985, 2306)

JOINT

APPENDIX

Supreme Court, U.S.
FILED
AUG 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 88-805

In The Supreme Court Of The United States

OCTOBER TERM, 1989

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, et al.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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Jurisdictional Statement Docketed November 10, 1988
Probable Jurisdiction Noted July 3, 1989

TABLE OF CONTENTS*

PAGE

Relevant Docket Entries iii

Complaint for an Order Authorizing Consent
To An Abortion Without Notification:
Cover Letter, Chief Justice
Frank D. Celebrezze JA-1
Instructions; JA-2
Form A; JA-6
Form B; JA-9
Form C; JA-12

Affidavit of Max Pierre Gaujean, M.D.,
Dated March 20, 1986 ..... JA-16

Affidavit of Rachel Roe,
Dated March 23, 1986 ..... JA-27

* All materials included herein have been reproduced verbatim, including any typographical errors.

The following documents of the Joint Appendix are reproduced in the Appendix to the Jurisdictional Statement and are designated in the brief by the reference (A-)

PAGE

Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit (Case No. 86-3664), entered August 12, 1988 ..... A-2

Order of the United States District Court for the Northern District of Ohio, Eastern Division (Case No. C86-1099A), entered April 22, 1986 ..... A-60

Memorandum and Order of the United States District Court for the Northern District of Ohio, Eastern Division (Case No. C86-1099A), entered August 22, 1986 ..... A-61

Notice of Appeal, United States Court of Appeals for the Sixth Circuit (Case No. 86-3664), filed October 24, 1988 ..... A-100

Text of Statutes Involved

Ohio Rev. Code Ann. §149.43 ..... A-36

Ohio Rev. Code Ann. §2151.85 ..... A-37

Ohio Rev. Code Ann. §2305.11 ..... A-42

Ohio Rev. Code Ann. §2505.073 ..... A-44

Ohio Rev. Code Ann. §2919.12 ..... A-46

Ohio Rev. Code Ann. §4731.22 ..... A-52

RELEVANT DOCKET ENTRIES

1. Complaint, filed March 21, 1986 (omitted from the Joint Appendix)

2. Application for Temporary Restraining Order and Motion for Preliminary and Permanent Injunction, filed March 21, 1986 (JA-16)

3. Affidavit of Max Pierre Gaujean, M.D, dated March 20, 1986 (JA-27)

4. Affidavit of Rachel Roe, dated March 23, 1986 (omitted from the Joint Appendix.

5. Amended Complaint, filed March 25, 1986 (omitted from the Joint Appendix)

6. Memorandum and Order of the District Court granting Plaintiffs' Motion for Temporary Restraining Order enjoining operation of Ohio Amended Substitute House Bill 319, ending April 9, 1989, filed April 1, 1986 (omitted from the Joint Appendix)

7. Order of the District Court extending the April 1, 1986 Order enjoining operation of Ohio Amended Substitute House Bill for a ten-day period, ending April 20, 1986, filed April 9, 1986 (omitted from the Joint Appendix)

8. Motion of Defendants Celeste and Celebrezze to Dismiss with Memorandum in Support, filed April 11, 1986 (omitted from the Joint Appendix)

9. Memorandum and Order of the District Court granting Plaintiffs permanent injunction, enjoining operation of Ohio Amended Substitute House Bill 319, filed April 22, 1986 (A-60)

10. Order of the District Court, permanently enjoining Defendants Slaby and Rosen from enforcing Ohio Amended Substitute House Bill 319, Ordering Defendants Celeste and Celebrezze dismissed, and Ordering Plaintiff Patty Poe dismissed, filed April 22, 1986 (A-61)

11. Memorandum and Order that Defendant class of municipal prosecutors as defined is certified, and the entire class is permanently enjoined from enforcing Amended Substitute House Bill 319, filed July 1, 1986 (omitted from the Joint Appendix)

12. Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit, affirming the district court, entered August 1, 1988 (A-2).

13. Notice of Appeal, filed October 24, 1988 (A-100).

The Supreme Court Of Ohio
Columbus

FRANK D. CELEBREZZE
A. WILLIAM SWEENEY
RALPH S. LOCHNER
ROBERT E. HOLMES
CLIFFORD F. BROWN
ANDY DOUGLAS
CRAIG WRIGHT

FRANK D. CELEBREZZE
Chief Justice

March 26, 1986

Honorable Kenneth A. Rocco
Cuyahoga Co. Juvenile Court
2163 E. 22nd St.
Cleveland, OH 44115

Dear Judge Rocco:

On March 24, 1986, substituted House Bill No. 319 became effective. Under this new legislation an unmarried, unemancipated woman under 18 years of age may seek judicial consent to have an abortion without notifying her parents, guardian or custodian.

I am sure that you are aware that such proceedings must be handled in a confidential and expeditious manner. Given the sensitivity of these proceedings, it is imperative that the bench be cognizant of the concerns of all parties involved. Please note that the enclosed complaint forms are simplified to assist even the unadvised and unrepresented teenager.

Should you have any concerns regarding this matter which you would like to discuss, please contact James Wm. Kelly, Clerk of the Ohio Supreme Court or Robert Edington, Counsel to the Clerk, at 614-466-5201.

Sincerely,

/s/
FRANK D. CELEBREZZE
Chief Justice

FDC:ccd
Enclosures

Dear Clerk:

Please be advised that an error appears on the first line of the instruction sheet for COMPLAINT FOR AN ORDER AUTHORIZING CONSENT TO AN ABORTION WITHOUT NOTIFICATION. The twelfth word of the first line should read abortion instead of adoption. Your cooperation and the correction of this error will be greatly appreciated.

COMPLAINT FOR AN ORDER AUTHORIZING CONSENT TO AN ABORTION WITHOUT NOTIFICATION

INSTRUCTIONS

For the purpose of seeking a court order to have an adoption without notifying one of your parents, guardian or custodian, **one** of the following complaint forms must be completed and filed with the Clerk for the Juvenile Court.

Fee: The law requires that **no** fee be charged when this type of complaint is filed.

Confidentiality: The confidentiality of this proceeding will be maintained by the court, its officers and employees. In order to preserve this confidentiality, the court will consider your name to be Jane Doe and, in all proceedings and documents, will refer to you as Jane Doe or complainant. If you do not have an attorney, you must, however, sign your real name at the end of the complaint and give an address where the court can contact you throughout this proceeding.

Choice of form: The complaint form that you choose depends upon your reason for seeking an abortion without notifying one of your parents, guardian or custodian.

If you believe that you are able to decide for yourself whether or not to have an abortion, use **Form A.**

If you believe that it is in your best interest to have an abortion without notifying one of your parents, guardian or custodian, use **Form B.**

If you believe that you are able to decide for yourself whether or not to have an abortion **and** that it is in your best interest to have an abortion without notifying one of your parents, guardian or custodian, use **Form C.**

Completion of form: Whether you choose Form A, B or C, the manner in which you complete the complaint form is the same. The following numbers correspond to the

numbered blanks which appear on the form that you decide to use. The numbered blanks should be filled in with the information that follows the corresponding number below.

(1) date on which it was medically determined that you are pregnant

(2) name of person who determined that you are pregnant

(3) your age

(4) name of the person or persons that the law requires you to notify if you wish to have an abortion

(5) relationship of the person or persons that the law requires you to notify if you wish to have an abortion

(6) name of the person or persons that the law requires you to notify if you wish to have an abortion; same as (4); if Form C is used this name must be repeated in blank (6a)

(7) name of the person or persons that the law requires you to notify if you wish to have an abortion; same as (4) and (6)

(8) current address of the person or persons that the law requires you to notify if you wish to have an abortion

(9) name of the person or persons that the law requires you to notify if you wish to have an abortion; same as (4), (6) and (7)

(10) relationship of the person or persons that the law requires you to notify if you wish to have an abortion; same as (5)

(11) your signature

(12) current address where you can be contacted during this pregnancy.

Affidavit: This portion of the complaint form must be completed in the presence of a person authorized to administer oaths, such as a judge or notary public.

Terminology: To increase your understanding of this proceeding, the following explanations are provided for your convenience:

COMPLAINANT: refers to you as a person making application to the court for an order to permit you to have an abortion without notifying your parent, guardian or custodian.

NOTARY PUBLIC: refers to a person who is authorized to administer oaths and certify documents.

UNEMANCIPATED: means that you have not entered the armed services of the United States, have not become employed and self-subsisting, nor otherwise become independent from parental, guardian or custodian care and control.

COURT OF COMMON PLEAS

_____ DIVISION

_____ COUNTY, OHIO

FORM A

In re complaint of Jane Doe. No. _____

COMPLAINT

1. Complainant states that on or about _____ (1)
_____ (2) determined that she is pregnant.

2. Complainant states that she is not presently, nor at any time to the present, married under the laws of the State of Ohio nor of any other state or foreign country; that she is _____ (3) years of age; and that she is unemancipated.

3. Complainant brings this action on behalf of herself because of her desire to terminate the pregnancy by abortion without notifying _____ (4)
her _____ (5).

4. Complainant alleges that she is sufficiently mature and well enough informed to intelligently decide whether or not to terminate the pregnancy by abortion without notifying _____ (6).

5. _____ (7) currently resides at _____ (8).

6. Complainant states that she (has) (has not) retained an attorney to represent her throughout this proceeding.

WHEREFORE, complainant prays this court issue an order authorizing complainant to consent to the performance or inducement of an abortion without notification of _____ (9), her _____ (10)

_____ (11)

_____

_____ (12)

2/86 Promulgated by the Clerk of the Supreme Court of Ohio pursuant to R.C. 2151.85(G).

AFFIDAVIT

_____, being first duly sworn, deposes and states the following:

that I have thoroughly read the complaint;

that to the best of my knowledge, information or belief, the facts and allegations set forth therein entitle me to the relief sought;

Further, affiant sayeth naught.

_____

Sworn to and subscribed before me on this _____ day of _____, 19 _____.

My commission expires _____, 19 _____.

_____

Notary Public

COURT OF COMMON PLEAS
_____ DIVISION
_____ COUNTY, OHIO

FORM B

In re complaint of Jane Doe. No. _____

COMPLAINT

1. Complainant states that on or about _____ (1) _____ determined that she is pregnant. (2)

2. Complainant states that she is not presently, nor at any time to the present, married under the laws of the State of Ohio nor of any other state or foreign country; that she is _____ (3) years of age; and that she is unemancipated.

3. Complainant brings this action on behalf of herself because of her desire to terminate the pregnancy by abortion without notifying _____ (4) her _____ (5).

4. Complainant alleges that notification of _____ (6) of her intent to terminate the pregnancy by abortion would not be in her best interest.

5. _____ (7) currently resides at _____ (8).

6. Complainant states that she (has) (has not) retained an attorney to represent her throughout this proceeding.

WHEREFORE, complainant prays this court issue an order authorizing complainant to consent to the performance or inducement of an abortion without notification of _____ _____, her _____
(9) (10)

_____
(11)

_____

_____
(12)

2/86 Promulgated by the Clerk of the Supreme Court of Ohio pursuant to R.C. 2151.85(G).

AFFIDAVIT

_____, being first duly sworn, deposes and states the following:

that I have thoroughly read the complaint;

that to the best of my knowledge, information or belief, the facts and allegations set forth therein entitle me to the relief sought;

Further, affiant sayeth naught.

_____

Sworn to and subscribed before me on this _____ day of _____, 19 _____.

My commission expires _____, 19 _____.

_____
Notary Public

COURT OF COMMON PLEAS
_____ DIVISION
_____ COUNTY, OHIO

FORM C

In re complaint of Jane Doe. No. _____

COMPLAINT

1. Complainant states that on or about _____ (1)
_____ (2) determined that she is pregnant.

2. Complainant states that she is not presently, nor at any time to the present, married under the laws of the State of Ohio nor of any other state or foreign country; that she is _____ (3) years of age; and that she is unemancipated.

3. Complainant brings this action on behalf of herself because of her desire to terminate the pregnancy by abortion without notifying _____ (4)
her _____ (5).

4. Complainant alleges that she is sufficiently mature and well enough informed to intelligently decide whether or not to terminate the pregnancy by abortion without notifying _____ (6). Complaint further alleges that notification of _____ (6a) of her intent to terminate the pregnancy by abortion would not be in her best interest.

5. _____ (7) currently resides

at _____ (8).

6. Complainant states that she (has) (has not) retained an attorney to represent her throughout this proceeding.

WHEREFORE, complainant prays this court issue an order authorizing complainant to consent to the performance or inducement of an abortion without notification of _____ (9), her _____ (10)

_____ (11)

_____

_____ (12)

2/86 Promulgated by the Clerk of the Supreme Court of Ohio pursuant to R.C. 2151.85(G).

AFFIDAVIT

_____, being first duly sworn, deposes and states the following:

that I have thoroughly read the complaint;

that to the best of my knowledge, information or belief, the facts and allegations set forth therein entitle me to the relief sought;

Further, affiant sayeth naught.

_____

Sworn to and subscribed before me on this _____ day of _____, 19 _____.

My commission expires _____, 19 _____.

_____

Notary Public

COURT OF COMMON PLEAS

_____ DIVISION

_____ COUNTY, OHIO

In re complaint of Jane Doe. No. _____

NOTICE OF APPEAL

Notice is hereby given that _____ complainant herein, appeals to the Court of Appeals for ___ County from the final order entered in the above-styled cause on _____ wherein _____ dismissed the complaint seeking an abortion without notification of _____ _____.

_____

_____

_____

STATE OF OHIO)
: SS.
COUNTY OF SUMMIT) AFFIDAVIT

MAX PIERRE GAUJEAN, M.D., being first duly cautioned and sworn, deposes and says, that if called to testify based upon personal knowledge, medical expertise and data recognized by the medical profession as reliable, he would say as follows:

1. I am a duly licensed and certified physician actively engaged in the practice of medicine specializing in obstetrics and gynecology (Ob-Gyn).

2. A copy of my resume or curriculum vitae is attached, marked Exhibit A, and incorporated herein.

3. Among other professional activities, I am engaged in the practice of my medical specialty at the Akron Center for Reproductive Health (hereafter Akron Center), Akron, Ohio, and the Cleveland Center for Reproductive Health in Cleveland, Ohio. I also have an office-based practice in Ob-Gyn in Cuyahoga County where I reside.

4. At the Akron Center my work consists of examining patients, determining their medical conditions and needs, inducing and performing abortions, performing follow-up care, prescribing medication and performing all necessary and proper medical procedures associated with these functions.

5. I have been practicing at the Akron Clinic for over six years and plan to continue doing so in the immediate future.

6. At Akron Center, approximately 15% of the patients I see are minors under the age of 18. In 1985 I treated more than 200 such patients.

7. I have reason to believe that, but for any change in the law concerning the performance of abortions

procedures, I can expect to see at least as many minor women seeking abortion services at Akron Center in 1986 as in 1985.

8. I am familiar with the safety, risks, costs and incidence of abortion, both nationally and in Ohio. My source of knowledge is my own practice in this state, and the United States government publications and professional medical journals and publications referred to in this affidavit.

9. Abortion is one of the safest surgical procedures. Nationally, in 1981, only 7 women died as a result of a legal abortions out of approximately 1,300,000 procedures performed, for a death-to-case rate of .5 per 100,000 abortions, according to the U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control, *Abortion Surveillance, Annual Summary 1981* at Table 18 (1985) (hereafter *Abortion Surveillance).* This is the lowest mortality rate recorded since the nationwide legalization of abortion in 1973. The low mortality is, in part, attributable to increasing numbers of abortions performed earlier in pregnancy. *Id.* at 9.

10. The risk of abortion, however, rises dramatically the later in pregnancy the procedure is performed. The nationwide statistics reported in *Abortion Surveillance* show that abortions at 16-20 weeks' gestation are associated with a risk of death sixteen times that of abortions performed at less than eights weeks. *Id.* at 10 and Table 19a.

11. If the three week delay necessitated by a judicial by-pass procedure caused a minor to delay her abortion from the thirteenth to the sixteenth week of pregnancy, the statistical probability of mortality would rise three and one-half times. *Id.* at Table 19a (and calculation of proportional weekly increases in risk calculated therefrom). The same ratio holds true even if only the statistics for dilatation and evacuation (D & E) abortions are used. *Id.* at Table 22. D & E is the most popular second trimester abortion technique. *Id.* at 14.

12. Although very few women die as a result of legal

abortion, the increase in risk of death as pregnancy advances is assumed to reflect a similar increase in the risk of non-fatal complications; the latter affects many more women. The studies of these complications (morbidity) bear this out. Grimes, *et al.*, *Prevention of Uterine Perforation During Curettage Abortion*, 251 J.A.M. A 2108, 2109 (1984), cited in *Abortion Surveillance* at 15. On the average, the overall incidence of major complications increases an average of 20% for each week an abortion is delayed from the seventh week onward. Tietze, *Induced Abortion, A World Review*, 1983 at 88 (1983). The increases are most dramatic during the second trimester, more than doubling as abortions move from the 13-14 to the 15-16 week interval. *Id.* at 89, Table 17.

13. In addition, as pregnancy advances into the second trimester, it may become more difficult for a woman to obtain a D & E (vaginal evacuation) abortion, as this method requires increasing physician skill the later in pregnancy it is performed.

14. In addition to the above medical risks associated with delay in obtaining abortion, there is also an increased financial burden. Akron Center, which reflects statewide trends, charges $200 for a first trimester abortion but must increase the charges on a progressive scale for every two weeks of delay thereafter to a maximum of $1,000. If a minor does not live in one of the few parts of the state where D & E out-patient second trimester abortions are available, she will incur additional costs to travel to a facility. When second trimester abortion is done on an out-patient basis it involves two days of procedure and requires that woman to stay near the facility overnight.

15. The above described financial and health burdens fall particularly heavily on minors who are more likely to obtain abortions at later gestational stages than adult women. For example, 8% of women less than 19 years of age had abortions performed at 16 or more weeks of pregnancy, as compared to 4% of women over that age. *Abortion Surveillance* at 6, and Table 14.

16. Any psychological or emotional trauma associated with abortion are, particularly in the case of an unmarried minor woman significantly less damaging than the psychological or emotional, as well as physical, traumas associated with a pregnancy, labor and delivery.

17. To this date it has been the practice of the Akron Center and my practice there not to require proof of parental notice or consent of minor women seeking abortion services although most of these patients come to the clinic with a parent or relative.

18. To this date it has been the practice of the Akron Center and my practice there to perform abortion services for minor women upon request and informed consent and without imposing any waiting period before doing the requested procedure.

19. In my experience most of the minor women who have come unaccompanied by a parent or relative to the Akron Center for abortion services are sufficiently well informed with respect to the medical and other implications, risks and consequences of abortion to make an informed decision on whether or not to have the procedure done without consultation with a parent or adult relative.

20. At the Akron Center unaccompanied minors who seek abortion services but, who, in my professional judgment, lack the understanding necessary to make an independent decision or informed consent concerning abortion are urged to consult with a respected adult of their choosing before abortion procedures are carried out. Only upon satisfaction that truly informed consent has been given will I proceed with any medical treatment including abortion.

21. Many minor women who come unaccompanied to Akron Center for abortions express a strong desire not to have a parent or adult relative notified of the fact of their pregnancy and/or their decision to have an abortion. Some indicate that they fear that such notification would be likely to cause the parent or adult relative to become violent,

abusive and hostile to them and that these adults would attempt to prevent them from having an abortion.

22. Based on my experience at the Akron Center, I believe that many unmarried, unemancipated minor women, if required either to notify a parent or an adult relative of their decision to have an abortion or go to court to secure an order dispensing with the notice requirement, will not do either but will, instead, seek other means of carrying out their intention to terminate their pregnancy. Among the alternatives to which they will turn will be traveling to other states where such notice is not required, unsafe and medically improper abortions at the hands of unqualified individuals, and attempts to self-abort.

23. I also believe, based upon my experience with minor patients at Akron Center, that a significant number of these young women, if forced to notify their parents or envoke a complicated court procedure, will delay securing abortion services until it becomes medically less safe to have such procedures performed. Others will, for lack of a safe alternative, carry an unwanted pregnancy to term.

24. Among the medical considerations which a physician must consider in determining the best course of medical treatment for any patient are the psychological and emotional implications of a certain procedure upon that patient given all of the surrounding circumstances. In my experience it is sometimes psychologically damaging to a minor patient, and therefore medically contraindicated, to require notification of her parent or other adult authority figure of her decision to seek an abortion. This is a matter which, in my opinion, should be left to the physician and his/her patient to determine after proper consultation.

25. I am familiar with the provisions of Amended Substitute House Bill 319 (commonly known as H.B. 319) recently passed by the Ohio Legislature and have considered its effect, to a reasonable medical certainty and probability, upon medical services including abortions as performed at clinics generally and Akron Center in particular.

26. Based upon my medical experience, the distinctions made in H.B. 319 between married and unmarried, emancipated and unemancipated minors have no bearing upon the real ability and qualification of a young woman to make a medically sound and informed decision regarding an abortion without consultation with a parent or relative. Neither marriage nor emancipation necessarily determine that a minor is mature or that she has access to the counsel of an adult which will be helpful to her in making an abortion decision. Conversely, neither non-marriage nor non-emancipation are indicative, for medical purposes, of immaturity or inability to make informed medical decisions.

27. Based upon my experience with minor patients who have been reluctant to inform a parent or adult relative of their decision to seek an abortion, most will likewise be unwilling to discuss intimate, medical concerns such as pregnancy and abortion with court officials, lawyers and judges. The complicated judicial proceedings provided for in H.B 319 necessarily will intimidate these patients; these procedures do not provide a realistic alternative.

28. It is difficult for many minor patients who seek abortions without the knowledge of a parent to find the resources, transportation and time away from school and other regulated portions of their time to come to a clinic and undergo an abortion procedure. Increasing these burdens by imposing mandatory waiting periods, filings in court, hearings, appeals and other activities required under H.B. 319 inevitably will lead many such minors to avoid safe and medically competent providers such as Akron Center and to choose dangerous alternatives.

29. As a physician, H.B. 319 places me and others similarly situated in the position of not being able to determine when I can and when I cannot legally perform or induce abortions upon a minor. At the risk of severe criminal penalty, civil liability, punitive damages and possible loss of license to practice medicine I must decide legal questions unrelated to my medical experience upon which the bill gives me little

or no guidance. Initially, I must determine at my peril whether a patient is a "minor" (e.g., What proof will be conclusive?), whether she is "married" (e.g., Does common law marriage apply?), whether she is "emancipate": as defined in the statute (e.g., Is a minor emancipated if she is employed but living in her parents' home?), and other circumstances which might trigger the operation of this law. If notice is to be given, the statute as written does not inform me as to such issues as: whether notice procedures can be carried out by paramedical personnel or must be done directly by the physician; what will constitute legally adequate proof of the age, parentage, custodial status, identity of the patient or the true identity of persons who declare themselves to be parents or custodians of the minor; what will be sufficient proof that the parent or custodian has "clearly and unequivocally" expressed that he/she does not wish to consult with the minor. If the minor chooses to file an affidavit to permit her to have a stepparent, grandparent or brother or sister over 21 notified instead of a parent, I am, by the terms of the law, left to determine, upon pain of the penalties referred to previously, the identity, relationship and age of someone purporting to be such a relative. And finally, if the minor requests (or says she has requested) a court order allowing her to dispense with notice but receives no notice of a decision within the time period, I have no way under the law of verifying that, in fact, a so-called "constructive order" is actually in effect. Moreover, the crime specified in R.C. §2919.12(B)(i) as enacted in H.B. 319 has no clear indication as to whether the physician who "knowingly" performs an abortion but does not have actual knowledge about the age, marital status or emancipation of a patient, can be prosecuted or not under the law.

30. The provisions of H.B. 319 which make it a matter of affirmative defense, upon which I must bear the burden of proof — that a pregnant woman provided false, misleading, or incorrect information about her age, marital status or emancipation or that there existed an "immediate threat of serious risk to the life or physical health of the pregnant woman from the continuation of her pregnancy" creating an "emergency necessitating the immediate performance or

inducement of an abortion" — do not provide an adequate safeguard. I can still be indicted and put to enormous expense and consequences adverse to my medical practice even in a situation where I have a legitimate affirmative defense. Nothing will prevent an unscrupulous prosecuting attorney from bringing such charges for political or ideological reasons, and, though I may ultimately prevail upon an affirmative defense, I will have suffered severe financial and professional damages.

31. As a physician H.B. 319 compels me, because of its serious consequences, its ambiguity and its seemingly contradictory provisions, to ignore medical considerations in my consultation with patients who are (or might be, despite their declarations) minors and to become an adversary to my patient in an effort to protect myself from legal liability. This conflict will inevitably interfere with the patient-physician relationship to the detriment of good medical practice.

32. From my experience at the Cleveland Center and my knowledge of practices at other facilities in Ohio where abortions are performed, I believe the consequences of H.B. 319 I have described will be generally applicable to all such medical providers, doctors and their respective patients.

Further affiant sayeth naught.

/s/
MAX PIERRE GAUJEAN, M.D.

SWORN TO and subscribed before me on this 20th day of March, 1986.

/s/
NOTARY PUBLIC

BRUCE A. CAMPBELL
Notary Public - State of Chio
Lifetime Comm.

MAX P. GAUJEAN, M.D.
Obstetrics and Gynecology

Born in Croix Des Bouquets
District of Port-Au-Prince
Republic of Haiti (W.I)
June 11, 1929

Elementary Education	Petit Seminaire College St-Martial Port-Au-Prince Haiti
Secondary Education	a) College de Port-Au-Prince b) Lycee Toussaint Louverture Port-Au-Prince Haiti
Diploma	Baccalaureat Part I July 1950 Baccalaureat Part II July 1951 Section Mathematics
University	Faculte de Medicine D., Haiti P.C.B(Annee Preparatoire) October 51-July 52 1st Year Med. Sch. Oct 52-Jul 53 2nd Year Med. Sch Oct 53-Jul 54 3rd Year Med. Sch. Oct 54-Jul 55 4th Year Med. Sch. Oct 55-Jul 56
Rotating Internship	General Hospital, Port-Au-Prince August 1st 1956-July 1957
Graduation	Medical Doctor August 3, 1957
Social Service	General Practice in Rural Areas Obligatory Service for Haiti October 1957-June 1959
Rotating Internship U.S.A.	George Hubbard of Meharry Med. College Nashville Tenn. July 1959-June 1960

Residency	1st Year Obstetrics & Gynecology Kansas-City General Hospital Kansas-City M.O July 1960-December 1960
General Surgery	Assistant Surgeon Hopital Justinien Cap-Haitien Haiti (W.I) Six Months Surgeon same Hopital Jan 1961-September 1962
Residency OB-GYN Canada	2nd and 3rd Year Resident in Obstetrics and Gynecology Hopital de la Misericorde Montreal P.Q Cacand September 1962-July 1964
	House Physician OB-GYN and General Surgery Hopital Notre-Dame Maria P.Q Canada July 1964-June 1966
U.S.A.	1st, 2nd, and 3rd Year Residency in Obstetrics and Gynecology St-Ann Hospital Cleveland Ohio July 1966-June 1969
Private Practice	Limited to Obstetrics and Gynecology Cleveland Ohio Jan 1970-Septem 1978
Full Time	Cleveland Metropolitan General Hospital Cleveland Ohio Sept 1978- to Now
Part Time	Emergency Physician at St-Lukes Hospital Cleveland Ohio

	Since 1979 until now
Affiliation	St-Lukes Hospital Huron Rd Hospital Booth Memorial Hosp Woman,s Hospital Metropolitan Gen Hospital All in Cleveland
Membership	American Fertility Society American Association of Gynecologic Laparoscopists American, College of Emergency Physician
License	To practice Medicine and Surgery In Pennsylvania, New-York, Ohio Massachussett, Georgia
University Affiliation	Assistant Clinical Professor Reproductive Biology Case Western University Cleveland Ohio

STATE OF OHIO)
: SS.
COUNTY OF SUMMIT) AFFIDAVIT

RACHEL ROE, being first duly sworn, states as follows:

1. I am 17 years of age and reside in Stark County, Ohio, with my parent and my two year old child.

2. I attend high school and expect to graduate in June, 1987.

3. I am pregnant and wish to have an abortion.

4. When I contacted the Akron Center for Reproductive Health to schedule an appointment for an abortion during the week of March 24, 1986, I was told that I must be accompanied by a parent or authorize the physician to notify a parent or go to court to get a court order allowing me to have the abortion without notifying a parent.

5. I cannot notify my parent and refuse to authorize a physician to notify my parent because:

a. my parent has told me that if I become pregnant again, my child and I will be thrown out of the house.

b. if my child and I are forced to leave my parent's house, I will be unable to finish high school as I will need to work to support my child and myself.

6. I cannot file an affidavit with the Juvenile Court stating that I fear physical abuse from my parent because I do not have a qualified relative or stepparent to file the required companion affidavit.

7. I refuse to file a complaint with the Juvenile Court based on my maturity or best interests for fear of personal exposure, fear of the consequences of an appearance before the Court, fear of humiliation and embarrassment, fear that my sexual activity or pregnancy will result in penalties to

me, as I have seen such penalties imposed on other minor women for their sexual conduct, and fear the Court will deny me the right to have the abortion without notifying my parent.

8. I am mature, consider myself well-informed, am a parent myself, and am unmarried because I do not wish to be married at this time and, further, I wish to complete my high school education prior to being married.

9. I wish to be a plaintiff in this lawsuit to assert my constitutional rights and the rights of other women similarly situated.

10. I request the Court to allow me to file an affidavit revealing my identity in a sealed envelope and to continue this suit under the pseudonym of Rachel Roe. I make this request because of the sensitive and private nature of this information.

FURTHER AFFIANT SAYETH NAUGHT.

/s/
RACHEL ROE

SWORN TO AND SUBSCRIBED BEFORE ME this 23rd day of March, 1986

/s/
BEVERLY J. PYLE, Attorney at Law
Notary Public - State of Ohio
My commission has no expiration date
Section 147.03 R.C.

APPELLANT'S

BRIEF

(16)

Supreme Court, U.S.
FILED
AUG 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 88-805

In The Supreme Court of The United States

OCTOBER TERM, 1989

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

1. Whether a statute that requires only parental notification of a minor's abortion decision must have a judicial bypass procedure to comply with the Due Process Clause of the Fourteenth Amendment.

2. Whether the Ohio parental notification statute's judicial bypass procedure, as facially challenged, ensures the due process rights of a minor seeking an abortion without parental notification.

3. Whether a statute that requires a physician to notify one parent of a minor's abortion decision imposes an undue burden on a minor's rights under the Due Process Clause of the Fourteenth Amendment.

PARTIES

The Appellant in this action is the State of Ohio, which intervened in this case pursuant to 28 U.S.C. §2403(b). In the Sixth Circuit, the appeal was filed by Summit County Prosecutor Lynn Slaby, who subsequently withdrew from the case.

The Appellees are Akron Center For Reproductive Health, Dr. Max Pierre Gaujean, and Rachel Roe.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION OF THIS COURT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

THE STATUTE

A. Notification 3

B. Judicial Bypass 4

C. Appeal 6

D. Penalties 7

PROCEDURAL HISTORY 8

SUMMARY OF ARGUMENT 12

ARGUMENT

I. A STATUTE THAT REQUIRES ONLY PARENTAL NOTIFICATION OF A MINOR'S ABORTION DECISION NEED NOT CONTAIN A JUDICIAL BYPASS PROCEDURE TO COMPLY WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT 16

A. History of the Bypass Proceeding 17

B. Standard of Review 20

C. Due Process Does Not Require That a Notice Statute Contain a Bypass Procedure 24

II. THE JUDICIAL BYPASS PROCEDURE PROVIDED BY THE OHIO PARENTAL NOTIFICATION STATUTE IS CONSISTENT WITH THE DICTATES OF THIS COURT AND ENSURES THE DUE PROCESS RIGHTS OF A MINOR SEEKING AN ABORTION WITHOUT PARENTAL NOTIFICATION 28

A. Confidentiality 30

B. Expedition and Constructive Authorization 33

C. Pleading Forms 37

D. Burden of Proof 41

III. THE OHIO STATUTE'S REQUIREMENT THAT A PHYSICIAN NOTIFY ONE PARENT OF A MINOR'S ABORTION DECISION IMPOSES NO UNDUE BURDEN UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT 45

CONCLUSION 50

APPENDIX TO BRIEF a-1

TABLE OF AUTHORITIES

CASES **PAGE**

Addington v. Texas,
441 U.S. 418 (1979) 42,43

Akron v. Akron Center for Reproductive Health,
462 U.S. 416 (1983) ..... *passim*

Bellotti v. Baird,
428 U.S. 132 (1976) 17

Bellotti v. Baird,
443 U.S. 622 (1979) ..... *passim*

Bobb v. Marchant,
14 Ohio St. 3d 1, 469 N.E.2d 847 (1984) 34

Colautti v. Franklin,
439 U.S. 379 (1979) 46

Frisby v. Schultz,
108 S.Ct. 2495 (1988) 29, 32

Ginsberg v. New York,
390 U.S. 629 (1968) 12, 20, 26

H. L. v. Matheson,
450 U.S. 398 (1981) ..... *passim*

Hambleton v. R. G. Barry Corp.,
12 Ohio St. 3d 179, 465 N.E.2d 1298 (1984) 40

Hartigan v. Zbaraz,
484 U.S. 171 (1987) 19, 22

Hodgson v. Minnesota,
853 F.2d 1452 (8th Cir. 1988)(*en banc*),
cert. granted, 109 S.Ct. 3240 (1989) 24

CASES **PAGE**

In re Bainbridge,
1988 Ohio App. LEXIS 2569
(Lorain Cty. June 29, 1988) 40

In re Adoption of Bovett,
33 Ohio St. 3d 102, 515 N.E.2d 919 (1987) 43

In re Adoption of Holcomb,
18 Ohio St. 3d 361, 481 N.E.2d 613 (1985) 44

In re Willmann,
24 Ohio App. 3d 191, 493 N.E.2d 1380
(Hamilton Cty. 1986) 44

Indiana Planned Parenthood Affiliates Ass'n v. Pearson,
716 F.2d 1127 (7th Cir. 1983) 24, 25

Margaret S. v. Treen,
597 F. Supp. 636 (E.D. La. 1984)
aff'd, 794 F.2d 994 (5th Cir. 1986) 25

Mathews v. Eldridge,
424 U.S. 319 (1976) 41, 42, 43

McKeiver v. Pennsylvania,
403 U.S. 528 (1971) 20

Morrissey v. Brewer,
408 U.S. 471 (1972) 41

New York v. Ferber,
458 U.S. 747 (1982) 29

New York State Ass'n v. City of New York,
108 S.Ct. 2225 (1988) 29

Parham v. J.R.,
442 U.S. 584 (1979) 26

CASES **PAGE**

Peterson v. Teodosio,
34 Ohio St 2d 161, 297 N.E.2d 113 (1973) 40

Planned Parenthood Ass'n v. Ashcroft,
462 U.S. 476 (1983) ..... *passim*

Planned Parenthood of Missouri v. Danforth,
428 U.S. 52 (1976) 12, 17, 18, 21, 25, 26, 27

Prince v. Massachusetts,
321 U.S. 158 (1944) 20, 43

Roe v. Wade,
410 U.S. 113 (1973) 16, 17, 26

Santosky v. Kramer,
455 U.S. 745 (1982) 41, 42, 43

Schall v. Martin,
467 U.S. 253 (1984) 29

Schweiker v. McClure,
456 U.S. 188 (1982) 44

United States v. Salerno,
481 U.S. 739 (1987) 29, 36

United Public Workers v. Mitchell,
330 U.S. 75 (1947) 20

United States v. Clark,
445 U.S. 23 (1980) 29

Webster v. Reproductive Health Services,
109 S.Ct. 3040 (1989) 13, 16, 17, 23, 29, 36, 48

Zbaraz v. Hartigan,
763 F.2d 1532, (7th Cir. 1985) *aff'd mem.*,
484 U.S. 171 (1987) 19, 20, 24

STATUTES and CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV 2, 10, 17, 26

28 U.S.C. §1254(2) 2

28 U.S.C. §2403(b) 10

42 U.S.C. §1983 2

Ohio Rev. Code Ann. §1.14 33

Ohio Rev. Code Ann. §102.03(B) 32

Ohio Rev. Code Ann. §102.99(B) 32

Ohio Rev. Code Ann. §149.43(A)(1) 5, 7

Ohio Rev. Code Ann. §2151.28(A)(1) 28

Ohio Rev. Code Ann. §2151.28(C) 28

Ohio Rev. Code Ann. §2151.352 36

Ohio Rev. Code Ann. §2151.85 ..... 2, 5, 10

Ohio Rev. Code Ann. §2151.85(A) 5

Ohio Rev. Code Ann. §2151.85(A)(4)(a) 38

Ohio Rev. Code Ann. §2151.85(A)(4)(b) 38

Ohio Rev. Code Ann. §2151.85(B)(1) ...5, 14, 33, 35

Ohio Rev. Code Ann. §2151.85(B)(2) 5, 15, 32 36, 39, 45

Ohio Rev. Code Ann. §2151.85(C)(1) 6, 38, 41

Ohio Rev. Code Ann. §2151.85(C)(2) 6, 38, 41

Ohio Rev. Code Ann. §2151.85(C)(3) 6, 38, 41

Ohio Rev. Code Ann. §2151.85(D) 5, 30, 31

Ohio Rev. Code Ann. §2151.85(E) 6

Ohio Rev. Code Ann. §2151.85(F) 5, 30, 31

Ohio Rev. Code Ann. §2151.85(G) 6

Ohio Rev. Code Ann. §2151.85(H) 6

Ohio Rev. Code Ann. §2505.073 .... 2, 6, 10, 33, 34, 45

Ohio Rev. Code Ann. §2505.073(A) 6, 7, 14 33, 35

Ohio Rev. Code Ann. §2505.073(B) 7, 30

Ohio Rev. Code Ann. §2919.12 ..... 2, 3

Ohio Rev. Code Ann. §2919.12(B) 4, 45

Ohio Rev. Code Ann. §2919.12(B)(1)(a) 3

Ohio Rev. Code Ann. §2919.12(B)(1)(a)(i) 3

Ohio Rev. Code Ann. §2919.12(B)(1)(a)(ii) 4

Ohio Rev. Code Ann. §2919.12(B)(1)(a)(iii) 4

Ohio Rev. Code Ann. §2919.12(B)(1)(b)(i) 4

Ohio Rev. Code Ann. §2919.12(B)(1)(b)(ii) 4

Ohio Rev. Code Ann. §2919.12(B)(1)(b)(iii) 4

Ohio Rev. Code Ann. §2919.12(B)(1)(c) 4

Ohio Rev. Code Ann. §2919.12(B)(2) 4

Ohio Rev. Code Ann. §2919.12(B)(3) 4

Ohio Rev. Code Ann. §2919.12(C)(1) 8

Ohio Rev. Code Ann. §2919.12(C)(2) 4, 8

Ohio Rev. Code Ann. §2919.12(D) 7

Ohio Rev. Code Ann. §2919.12(E) 7

Ohio Rev. Code Ann. §2919.12(F) 3

Ohio Rev. Code Ann. §2929.11(B)(7) 7

Ohio Rev. Code Ann. §2929.11(C)(4) 7

Ohio Rev. Code Ann. §2929.21(B)(1) 7, 32

Ohio Rev. Code Ann. §2929.21(C)(1) 7, 32

Ohio Rev. Code Ann. §3321.19 28

Ohio Rev. Code Ann. §4731.22(B)(19) 7

RULES

Ohio S. Ct. R. Prac. XVI 29

Ohio R. App. P. 14(A) 34

Ohio R. Civ. P. 15(A) 40

Ohio R. Juv. Proc. 4(A) 36

Ohio R. Juv. Proc. 18(A) 33

Ohio R. Juv. Proc. 22(B) 40

CASE NO. 88-805

In The Supreme Court Of The United States

OCTOBER TERM, 1989

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, et al.,

Appellees.

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, issued on August 12, 1988, is set forth in the appendix to the Jurisdictional Statement (A-2)[1] and is reported at 854 F.2d 852. The decision of the United States District Court for the Northern District of Ohio, Eastern Division, is also set forth in the appendix to the Jurisdictional Statement (A-61) and is reported at 633 F. Supp. 1123.

JURISDICTION OF THIS COURT

This is an appeal from a judgment of the United States Court of Appeals for the Sixth Circuit entered on August

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[1] References to "(A-)" are to the appropriate pages in the appendix to the Jurisdictional Statement. References to "(JA-)" are to the appropriate pages in the Joint Appendix. References to "(a-)" are to the appropriate pages in the appendix to the Brief of Appellant.

12, 1988, holding the statutes enacted in Ohio Amended Substitute House Bill 319 unconstitutional. This action was initiated by Appellees in the district court by filing a complaint pursuant to 42 U.S.C. Section 1983 seeking declaratory and injunctive relief. The Notice of Appeal was filed with the Sixth Circuit Court of Appeals on October 24, 1988, within 90 days of entry of the court of appeals' judgment. This appeal is taken, and jurisdiction conferred upon this Court, under 28 U.S.C. Section 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

Ohio Amended Substitute House Bill 319 is appended to the opinion of the Sixth Circuit Court of Appeals. (A-35).

STATEMENT OF THE CASE

THE STATUTE

The Ohio Legislature on November 20, 1985, passed Amended Substitute House Bill 319 ("H.B. 319") (also referred to herein as "the Ohio Statute," "the Statute," "the Ohio Act," or "the Act") which was scheduled to become effective on March 24, 1986. The Statute's major provisions are contained in Ohio Rev. Code Ann. §§2151.85, 2919.12 and 2505.073 (Anderson Supp. 1988). Section 2919.12 is a criminal statute that imposes parental notification obligations upon individuals who perform or induce abortions on minors. Section 2151.85 provides a judicial procedure to bypass the obligations delineated in Section 2919.12. Section 2505.073 creates an appellate process to be utilized by an unemancipated, pregnant minor who is unsuccessful in her attempt under Section 2151.85 to bypass the parental notification requirements of Section 2919.12.

A. Notification

Section 2919.12 prohibits any person from knowingly performing or inducing an abortion upon an unmarried, unemancipated,[2] pregnant minor without supplying notice as to the intention to perform or induce the abortion to one of several designated individuals. Ohio Rev. Code Ann. §2919.12(B)(1)(a), (A-46). The State of Ohio has acknowledged that the term "person" refers to the treating physician. *See Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123, 1135 (N.D. Ohio 1986), (A-78), *aff'd*, 854 F.2d 852 (6th Cir. 1988).[3]

The physician must notify one of the minor's parents, or her guardian or custodian. Ohio Rev. Code Ann. §2919.12(B)(1)(a)(i), (A-46-47). Such notice must be "actual," meaning it must be accomplished either in person or over the telephone, and it must occur at least twenty-four (24) hours prior to the performance or inducement of the abortion. *Id.* In lieu of notice to one of the minor's parents, or her guardian or custodian, the physician may notify a sibling who is at least twenty-one (21) years old, or a designated stepparent or grandparent of the minor. *Id.* To effectuate this alternative to notification of the minor's parents, guardian, or custodian, the minor must supply the identity of the prospective recipient of the notification to the physician with clarity, naming the recipient, specifying the nature of the relationship, and if the recipient is a sibling, indicating his or her age. Ohio Rev. Code Ann. §2919.12(B)(1)(b)(i), (A-48). The minor must execute and file in a juvenile court an affidavit

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[2] The term unemancipated is defined as "a woman who is unmarried and under eighteen years of age[,] has not entered the Armed Forces of the United States, has not become employed and self-subsisting, or has not otherwise become independent from the care and control of her parent, guardian or custodian." Ohio Rev. Code Ann. §2919.12(F), (A-52).

[3] For clarity the two lower court opinions will hereinafter be referred to as "*Akron II*" with citations to the appropriate reporter and appendix page.

averring that, because of a pattern of parental or custodial abuse, she is in fear of same. Ohio Rev. Code Ann. §2919.12(B)(1)(b)(ii), (A-48). The minor must also supply to the juvenile court the name and address of the physician, *id.*, along with an affidavit from the prospective recipient that also avers that the minor will be at risk of parental or custodial abuse. Ohio Rev. Code Ann. §2919.12(B)(1)(b)(iii), (A-48). When the affidavits are filed, the juvenile court must notify the physician promptly, and if possible by telephone or in person. Ohio Rev. Code Ann. §2919.12(B)(1)(c), (A-49).

Where notice in person or by telephone to the parent, guardian or custodian cannot be supplied despite a reasonable effort to do so, the Statute provides for forty-eight (48) hour constructive notice. Ohio Rev. Code Ann. §2919.12(B)(2), (A-49). The Statute requires written notice to be mailed by both ordinary and certified mail to the last known address of either the parent, guardian, or custodian; or the specifically designated sibling, stepparent, or grandparent. *Id.* The forty-eight (48) hour period runs from the time of mailing. *Id.*

If one of the minor's parents, her guardian, or her custodian consents in writing to an abortion, then neither notification nor any waiting period is required. Ohio Rev. Code Ann. §2919.12(B)(1)(a)(ii), (A-48). Similarly, if a juvenile court authorizes the minor to consent without parental notification, neither notification nor a waiting period is needed. Ohio Rev. Code Ann. §2919.12(B)(1)(a)(iii), (A-48-49). Furthermore, notification and a waiting period are not required if a medical emergency intervenes. Ohio Rev. Code Ann. §2919.12(C)(2), (A-51). Finally, the waiting period is waived if the recipient of the notification "clearly and unequivocally" indicates no desire to consult with the minor. Ohio Rev. Code Ann. §2919.12(B)(3), (A-50).

B. Judicial Bypass

In addition to the procedure in Section 2919.12(B), the Statute creates another option to parental notification. Section 2151.85 provides that an unmarried, unemancipated

minor wishing to abort without parental or custodial notification may file a complaint, under oath, in the juvenile court of her county of residence, an adjacent county, or the county wherein the abortion facility is located, seeking court waiver of the notification requirement. Ohio Rev. Code Ann. §2151.85(A), (A-37-38). The Ohio Supreme Court issued three complaint forms, one of which must be used to initiate the bypass proceeding. (JA-6-14).

The complainant must allege that she is pregnant, unmarried, unemancipated, and under eighteen years of age. *Id.* She must further allege that she wishes to have the abortion performed without notification to her parents, guardian or custodian. *Id.* Finally, the complainant must allege either or both of the following: that she is mature and well enough informed to intelligently decide whether to abort without such notification, or that notification would not be in her best interest because of abuse or some other reason. *Id.*

At the earliest possible time, but in no event later than five business days after the day the complaint is filed, the court must hear the complaint on the record, without referring it to a referee. Ohio Rev. Code Ann. §2151.85(B)(1), (A-39). Immediately after hearing the court must enter judgment. *Id.* If no hearing is held or no judgment is entered within five business days of the filing of the complaint, a constructive order authorizing the abortion without notification is deemed to have been entered. *Id.*

A guardian ad litem and an attorney must be appointed to represent the minor at the hearing. Ohio Rev. Code Ann. §2151.85(B)(2), (A-39-40). The parents, guardian, or custodian of the minor are precluded from attending or even knowing of the proceeding. Ohio Rev. Code Ann. §2151.85(D), (A-41). The record of the hearing is confidential, and the hearing is to be conducted in a manner that will preserve anonymity of the complainant. Ohio Rev. Code Ann. §§2151.85(F), (A-41) and 149.43(A)(1) (Anderson Supp. 1985), (A-36). All records and papers that pertain to the action shall be kept confidential and are not public records under Ohio

law. *Id.* No fees or costs are charged to the minor. Ohio Rev. Code Ann. §2151.85(H), (A-42). Forms prescribed by the Clerk of the Ohio Supreme Court are to be provided for use in instituting both the action in the juvenile court and any subsequent appeal to the court of appeals. Ohio Rev. Code Ann. §2151.85(G), (A-42).

If the minor claims that she is mature and well enough informed to make an intelligent abortion decision, or that notification would not be in her best interest, then the court will consider the claim or claims that have been pleaded. Ohio Rev. Code Ann. §2151.85(C)(1) and (C)(2), (A-40). If she, her attorney or guardian produce clear and convincing evidence of her maturity or best interest, the court will issue an order authorizing an abortion without notifying her parents, guardian, or custodian. *Id.* If no such evidence is produced, the court will dismiss the complaint, and immediately inform the minor of her right to appeal under Section 2505.073. Ohio Rev. Code Ann. §2151.85(C)(1), (C)(2), and (E), (A-40-41).

If the minor claims both maturity and that notification would not be in her best interest, the court will not consider the latter unless and until it dismisses the former. Ohio Rev. Code Ann. §2151.85(C)(3), (A-40). If the minor establishes her maturity by clear and convincing evidence, an order will issue that notification is not required. If she fails in that regard, the court will then decide whether notification would not be in her best interest. Should the court be clearly convinced that notification would not be in her best interest, it will issue an order that notification is not required. Otherwise, it will dismiss the entire complaint and immediately apprise the minor of her appellate rights. Ohio Rev. Code Ann. §2151.85(E), (A-41).

C. Appeal

An expedited, confidential appeal process is set forth in Section 2505.073. As in the juvenile court, no fees or costs are assessed to the minor. Ohio Rev. Code Ann. §2505.073(A), (A-44). Similarly, the proceedings are confidential and not

a matter of public record. Ohio Rev. Code Ann. §§2505.073(B), (A-45) and 149.43(A)(1), (A-36). While no appointed appellate counsel is mandated by the Statute, the court of appeals is directed to liberally modify or dispense with the formal requirements that ordinarily apply to the appellant's brief. Ohio Rev. Code Ann. §2505.073(A), (A-44).

The appeal must be docketed within four days of the filing of the notice of appeal. *Id.* The minor shall file her brief within four days after the appeal is docketed, and the court shall hear oral arguments, unless waived, within five days after the appeal is docketed. *Id.* The court of appeals must enter its judgment immediately after oral argument or, if argument is waived, within five days of the docketing date. If the court does not enter a judgment within five days of the docketing date, a constructive order in favor of the minor results. *Id.*

D. Penalties

A person who performs an abortion in violation of the Ohio Statute is subject to criminal, civil, and administrative penalties. Specifically, a first time offender is guilty of a first-degree misdemeanor and all subsequent violations constitute a fourth-degree felony. Ohio Rev. Code Ann. §2919.12(D), (A-52).[4] A minor's parents may institute a civil action against an offender for both compensatory and exemplary damages. Ohio Rev. Code Ann. §2919.12(E), (A-52). Administratively, physicians are exposed to having their licenses to practice medicine limited, revoked, or suspended by the State Medical Board. Ohio Rev. Code Ann. §4731.22(B)(19) (Anderson Supp. 1988), (A-56).

A physician charged with violation of the Statute does have

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[4] A first degree misdemeanor is punishable by a maximum fine of one thousand dollars and six months imprisonment, Ohio Revised Code Ann. §2929.21(B)(1) and (C)(1), (a-8) and a fourth degree felony is punishable by a maximum fine of two thousand five hundred dollars, and the minimum term of imprisonment shall be eighteen (18) months, two (2) years, thirty (30) months or three (3) years, with a maximum term of five (5) years. Ohio Rev. Code Ann. §2929.11(B)(7) and (C)(4), (a-7).

two affirmative defenses. No liability will result when a physician who, despite good faith, was provided false, misleading, or incorrect information by the minor about her age, marital status, emancipation, the age of her sibling, or the last known address of either of her parents, her guardian, her custodian, or designated sibling, stepparent or grandparent. Ohio Rev. Code Ann. §2919.12(C)(1), (A-51). It is also an affirmative defense if the abortion was performed as a medical emergency, where there was an immediate threat of serious risk to the life or physical health of the minor. Ohio Rev. Code Ann. §2919.12(C)(2), (A-51).

PROCEDURAL HISTORY

On March 21, 1986, the Friday before the statute was to take effect, an Ohio corporate provider of abortion services, one of its physician-employees, and one of its patients commenced suit in the United States District Court for the Northern District of Ohio, Eastern Division, challenging the constitutionality of H.B. 319. The corporate provider of abortion services was the Akron Center for Reproductive Health ("Akron Center"). Max Pierre Gaujean, M.D., was the physician-employee of Akron Center, and Patty Poe (a pseudonym) was the patient. Named as Defendants in the complaint were Ohio Governor Richard F. Celeste, Ohio Attorney General Anthony J. Celebrezze, Jr., and Lynn Slaby, the Prosecuting Attorney for Summit County, Ohio. Plaintiffs sued all three Defendants in their official capacities only. Additionally, they named Slaby as a representative of Ohio's eighty-eight (88) county prosecutors.

Akron Center claimed that the Statute would adversely affect its interests by exposing its agents and/or employees to criminal or civil liability. Further, Akron Center claimed to represent classes of all unmarried, unemancipated, pregnant minors who were desirous of obtaining abortions. Included were: (1) pregnant minors who allegedly were mature and well enough informed to make a decision to abort, (2) pregnant minors who allegedly were immature, but in whose best interest parental notification would have been unwarranted, (3) those minors who claimed to be burdened

by the Statute's waiting periods; and (4) minors who simply did not care to disclose their sexual activity to either their parents or relatives, or to a court. Dr. Gaujean claimed to represent the same classes of women as did Akron Center. Patty Poe claimed to be a mature and well enough informed minor to make an informed abortion decision; however, she was not sure whether she was pregnant.

The Plaintiffs amended their complaint and added two parties. The new party plaintiff was Rachael Roe. Roe alleged that she was pregnant, that she wanted an abortion, and that she was refused one by Akron Center. She further alleged she was mature and that her best interests would not be served by notifying her parents. The new party defendant was Gary M. Rosen, the Prosecutor for the City of Akron, Ohio. Like Slaby, Rosen was sued in both his official capacity and as representative of a class—all police prosecutors in Ohio.

On March 31, 1986, the district court stated that it would restrain Defendants from enforcing H.B. 319, and the court issued a memorandum and order on April 1, 1986, granting a motion for a temporary restraining order for ten (10) days. This order was later extended for an additional ten-day period until April 20, 1986.

At no time was a formal hearing held or any evidence admitted into the record. On April 21, 1986, the district court entertained oral argument on the preliminary injunction and merits of the case. The following day, the court issued a Memorandum and Order, *Akron II*, 633 F. Supp. 1123, (A-61), in which it found Defendants Slaby and Rosen were proper parties to bear the injunctive relief requested by the Plaintiffs, *id.* at 1129, (A-66-67); that Patty Poe lacked standing, *id.* at 1128, (A-66); that Defendants Celeste and Celebrezze did not possess the necessary connection to the enforcement of the Statute and therefore were dismissed, *id.* at 1129-1130, (A-69-70); and that the court viewed the filing of this action against the state officials as certification required by 28 U.S.C. §2403(b) and considered the Attorney General's participation in this litigation as that permitted

under said statute, *id.* at 1130, (A-70).

In striking down the Statute the district court found five provisions of the Statute constitutionally defective.[5] Four of these provisions concerned the judicial bypass procedures under Ohio Rev. Code Ann. §2151.85 and the appellate procedures under Section 2505.073, which the court determined to be constitutionally mandated. *Akron II,* 633 F.Supp. at 1133, (A-75). The remaining issue concerned the requirement of physician notification.

Although it found the Ohio Statute constitutional in part, the district court found that certain provisions violated the Due Process Clause of the Fourteenth Amendment and concluded that the infirm provisions could not be severed from the remaining portions of the Statute, and accordingly, enjoined the enforcement of the Statute in its entirety. *Id.* at 1144-45, (A-98-99).

On appeal, the Sixth Circuit affirmed the district court's decision. *Akron II,* 854 F.2d 852 (A-2). The court recognized that a minor's right to receive an abortion without parental involvement was not absolute. *Id.* at 857, (A-10). The Sixth Circuit found a difference between parental consent statutes that allowed an absolute veto and the Ohio Statute that required only parental notification. *Id.* at 860, (A-16). The court then identified the first issue of this case to be whether a judicial bypass proceeding required for a consent statute is mandated when the statute in question requires only parental notification. The Sixth Circuit held that the state's

[5] The district court did not find each of the Plaintiffs' attacks on the Statute's constitutionality well-taken. It specifically rejected the arguments that challenged the Statute on grounds of vagueness, *id.* at 1133-34, (A-76); that the twenty-four (24) and forty-eight (48) hour waiting periods were arbitrary and inflexible, *id.* at 1138-1139, (A-86-87); that the Statute violated the United States Constitution by not providing for appointed counsel on appeal, *id.* at 1139-1140, (A-89); and that a minor seeking to use the waiver proceeding would be forced to forego her Fifth Amendment privilege against self-incrimination, *id.* at 1141, (A-91). Plaintiffs took no appeal from the district court ruling on these issues.

parental notification statute required a judicial bypass proceeding in the case of a mature or best interest minor. *Id.* at 861, (A-17). Therefore, the Sixth Circuit reviewed the Ohio Statute's bypass procedure in light of the standards established in *Bellotti v. Baird,* 443 U.S. 622 (1979) ("*Bellotti II*"). *Akron II,* 854 F.2d at 861, (A-19).

The Sixth Circuit found that the state's interest in ensuring parental involvement in a minor's abortion decision was not advanced by requiring the physician to notify a parent. The court concluded that the physician notice requirement placed an undue burden on the minor's right to seek an abortion. *Id.* at 862, (A-19).

The bypass procedure was scrutinized and the Sixth Circuit affirmed the lower court in all respects with the exception of two portions of the opinion related to the confidentiality provisions. The lower court reversed the district court's conclusion that the venue provisions and the state reporting requirements for child abuse or neglect denied anonymity to a minor. *Akron II,* 854 F.2d at 866, (A-27). Nonetheless the Statute's confidentiality provisions were found to be insufficient to comply with the dictates of *Bellotti II. Akron II,* 854 F.2d at 865, (A-28). The Sixth Circuit, while agreeing with the district court that "the State of Ohio has taken laudable steps toward complying with *Bellotti II's* anonymity requirement," held that requiring the minor to sign her full name to the complaint form and provide an address where she could be reached resulted in an insufficient guarantee of anonymity. *Id.,* (A-26). The Sixth Circuit brushed aside the Statute's remaining confidentiality provisions as mere precatory language. *Id.,* (A-26).

The Sixth Circuit expressed concern that the Statute's provisions for expediting the judicial bypass procedure were insufficient, *id.* at 868, (A-31), and thus placed an undue burden on the minor. The Sixth Circuit found the constructive authorization provision to be potentially confusing because of the lack of a tangible order should the state juvenile or

appellate court fail to act within the statutory guidelines. *Id.*, (A-33).

The Sixth Circuit also reviewed the pleading forms and burden of proof requirements of the bypass procedure. The court found the Statute's requirement that the minor must establish by clear and convincing evidence that she is mature or that notification is not in her best interest was an undue burden on the minor's right to choose an abortion. *Id.*, at 864, (A-22). Regarding the pleading forms the court believed that they would unduly burden a minor's right to bypass parental intervention because of a risk that she could select the wrong form. *Id.* at 863, (A-20-21).

As a result of these holdings, the Sixth Circuit affirmed the judgment of the district court enjoining the enforcement of the Statute. *Id.* at 861, (A- 17).

The State of Ohio filed notice of its appeal. (A-100).

SUMMARY OF ARGUMENT

A cardinal principle of our Nation's jurisprudence is that states are entitled to enact laws designed to aid parents in discharging their responsibility for the upbringing of their children. *See Ginsberg v. New York*, 390 U.S. 629 (1968). Accordingly, this Court has recognized that a state has a significant interest in encouraging an unmarried, pregnant minor to seek the help and advice of her parents in making the grave decision of whether or not to bear a child. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J., concurring). A state can require a minor to obtain the consent of her parents before exercising her right to an abortion as long as the minor is given an opportunity to bypass parental consent by demonstrating to a court that either she is mature enough to make her own abortion decision or that parental involvement in her decision would not be in her best interest. *See, e.g., Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983).

A judicial bypass proceeding is not, however, constitutionally mandated for a statute that requires only parental notice. This Court has expressly declined to equate notice with consent because notice does not subject a minor's abortion decision to a possibly arbitrary, third-party veto. *H. L. v. Matheson*, 450 U.S. 398, 411 n.17 (1981). Furthermore, a state's interest in protecting a minor from the long range consequences of an ill-advised abortion decision prevails over the initial discomfort that a minor may experience upon notifying a parent of her intent to have an abortion. While public policy may suggest that a minor's maturity or best interest be considered before parental notice is required, this is a matter that lies within the province of state legislatures, not within judicial scrutiny.

The Ohio Statute requires only parental notice. Although the Statute contains a bypass procedure, a determination by this Court that a bypass procedure is not required for a notice statute would end the inquiry. Assuming, *arguendo*, that the bypass standards of *Bellotti II* apply to a notice requirement, the Ohio Statute does not impose an undue burden on a minor's right to an abortion without parental notification.

This appeal is a facial challenge to the constitutionality of the Ohio Statute. In order for the Act to be declared unconstitutional, there must be no set of circumstances under which the Act would be valid. *Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3060 (1984) (O'Connor, J., concurring). Viewing the Ohio Statute with this principle in mind, it is clear that the Sixth Circuit engaged in unwarranted speculation that envisioned the worst possible scenario in order to find the Ohio Statute unconstitutional.

The Sixth Circuit found that the Statute failed to preserve *Bellotti II* requirements of confidentiality and expedition. *Akron II*, 854 F.2d at 864-68, (A-24-31). The lower court determined the Statute did not ensure the confidentiality of the bypass proceeding because it requires the minor to sign her petition and provide an address where she can be contacted unless she is represented by counsel. *Id.* at 865,

(A-26). This conclusion conflicts with the decision rendered in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983) in which the Court upheld a Missouri consent statute that required a bypass petition to be signed by a minor or next friend and mandated that the minor provide the names and addresses of her parents. *Id.* at 479 n.4. Furthermore, the Sixth Circuit presumed that court personnel would not adhere to the Act's confidentiality provisions despite the fact that a violation could result in criminal penalties. Such conjecture has no place in a review of the facial validity of a statute.

Regarding expedition, although the Sixth Circuit determined that Ohio's bypass procedure, including the appellate process, would at a *maximum* span twenty-two days, it concluded that this procedure would not be expedient. *Akron II*, 854 F.2d at 867, (A-30). Once again, the Sixth Circuit's decision cannot be reconciled with *Ashcroft* in which the Court upheld a bypass procedure spanning sixteen or seventeen days *plus* a sufficient period of time for decision-making at both the trial and appellate levels. 462 U.S. at 491 n. 16. In addition, the Sixth Circuit did not acknowledge the provision of the Ohio Statute that allows time periods to be shortened upon a showing of good cause. Ohio Rev. Code Ann. §2505.073(A), (A-45).

Moreover, the Ohio Statute safeguards the timeliness of the bypass proceeding by allowing a physician to proceed with an abortion if either the juvenile court or the court of appeals fails to act on a minor's complaint or appeal within five days. Ohio Rev. Code Ann. §§2151.85(B)(1), (A-39) and 2505.073(A), (A-45). Curiously, the Sixth Circuit found this safeguard to be an undue burden on a minor's right to an abortion because the Statute did not specify how the physician was to be made aware of a constructive order. *Akron II*, 854 F.2d at 868 (A-32-33). Although a proper analysis of the Statute should have lead the court to conclude that the Statute provides for expediency and that there are several ways in which a physician could learn of a constructive order, the court's tunnel-vision approach lead it to conclude otherwise.

The Sixth Circuit continued to engage in unwarranted speculation in its review of the Statute's pleading requirements. The court concluded that requiring a minor to choose from one of three pleading forms may jeopardize her right to show her best interest if she should file the wrong form. *Akron II*, 857 F.2d at 863, (A-20). The Statute, however, ensures that all minors will be represented by counsel. Ohio Rev. Code Ann. §2151.85(B)(2), (A-39). This factor, when coupled with Ohio's liberal policy for amending pleadings, negates the Sixth Circuit's concern that a minor may be foreclosed from raising a valid claim due to selecting the wrong form. As in all other civil cases, the Statute simply requires a minor to set forth whatever legitimate claims she has in her pleading. The Statute in no way jeopardizes a minor's right to raise both maturity and best interest claims.

The Sixth Circuit also invalidated the Statute's requirement that a minor prove her maturity or best interest by clear and convincing evidence. The Sixth Circuit erred in concluding that this provision created the risk of an erroneous deprivation of a mature minor's constitutional right to proceed without parental intervention. *Akron II*, 854 F.2d at 864, (A-23). This conclusion is undermined by the fact that neither the parent nor the state is represented in a bypass procedure that is *ex parte* and nonadversarial in nature. Thus, the minor offers the only evidence for consideration. The clear and convincing standard accomodates the state's interest in ensuring that the outcome of the proceeding is a reliable determination of the minor's maturity or best interest. Furthermore, the private interest affected by the risk of an erroneous decision is not compelling since even a decision adverse to the minor would not divest her of the right to proceed with an abortion.

The Ohio Statute requires a physician to notify one parent of a minor's decision to have an abortion. The Sixth Circuit determined, based on faulty reliance on *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) ("*Akron I*"), that the physician notice requirement unduly burdened a minor's rights. *Akron I* addressed only the constitutionality of requiring a physician to give information that pertains to

informed consent. 462 U.S. at 446-47. *Akron I* does not prohibit a state from requiring a physician to contact the parent of a minor seeking an abortion. Moreover, a physician notice requirement furthers the state's interest in protecting minors "by providing an opportunity for parents to supply essential medical and other information to a physician." *H. L. v. Matheson,* 450 U.S. 398, 411 (1981). An exchange of information between parent and physician also facilitates consultation between parent and child. The attending physician can provide the parent with information that will aid a parent's ability to assist the minor though this difficult time. The Sixth Circuit clearly erred in finding that the State did not have an interest which warranted direct physician contact. Ohio's physician notice requirement imposes no undue burden on a minor's rights and is constitutional.

The Sixth Circuit examined the Ohio Statute in a manner that created obstacles to a constitutional construction when it should have avoided them. Such an interpretation violates the principle of statutory construction mandated when a statute is facially challenged. The judgment of the Sixth Circuit declaring various provisions of the Ohio Statute unconstitutional must be reversed.

ARGUMENT

I. A STATUTE THAT REQUIRES ONLY PARENTAL NOTIFICATION OF A MINOR'S ABORTION DECISION NEED NOT CONTAIN A JUDICIAL BYPASS PROCEDURE TO COMPLY WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Last term, in *Webster v. Reproductive Health Services,* 109 S.Ct. 3040 (1989), this Court was urged to overrule its holding in *Roe v. Wade,* 410 U.S. 113 (1973). *Webster,* 109 S.Ct. at 3058. While the plurality opinion declared the trimester analysis of *Roe* "unsound in principle and unworkable in practice," the plurality declined to address the validity of *Roe,* stating "[t]his case . . . affords us no occasion to revisit the holding of *Roe,* . . . and we leave it undisturbed." *Id.*

Similarly, the issues involved in the instant case do not provide this Court with an occasion to revisit the holding of *Roe.* As with *Webster,* today the Court does not face a statutory prohibition of abortion. Rather, this case concerns a state's power to regulate a minor's ability to choose an abortion without notifying her parent. Specifically, this appeal presents two central inquiries: first, does the United States Constitution require states to provide a judicial bypass procedure for a pregnant minor who wishes to avoid notifying her parent [6] of her decision to have an abortion; and second, does the Ohio Statute unduly burden a minor's rights under the Due Process Clause of the Fourteenth Amendment.

A. History of the Bypass Proceeding

This Court in *Planned Parenthood of Missouri v. Danforth,* 428 U.S. 52 (1976) began its consideration of the extent to which statutorily mandated parental intervention into a minor's abortion decision is constitutional. The Missouri statute required pregnant women under the age of eighteen to obtain parental consent to an abortion in all cases unless the abortion was medically necessary to save the life of the mother. *Danforth,* 428 U.S. at 72. This Court struck down the Missouri statute, finding that giving a parent or third party "an absolute and possibly arbitrary veto" over the abortion decision of a minor child was unconstitutional. 428 U.S. at 74-75.

In the companion case of *Bellotti v. Baird,* 428 U.S. 132 (1976) ("*Bellotti I* "), this Court was presented with a Massachusetts consent statute that contained a provision for hearing before a superior court judge in the event one or both parents refused consent. 428 U.S. at 134-35. The Court abstained from reviewing the statute to provide the Massachusetts Supreme Judicial Court with an opportunity to rule on the constitutionality of its statute consistent with *Danforth. Bellotti I,* 428 U.S. at 151.

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[6] The term "parent" will be used for simplicity to denote parent, guardian, custodian, specifically designated sibling, stepparent or grandparent.

Three years later, the Court had occasion to reconsider the constitutionality of the earlier deferred Massachusetts statute. *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality opinion) ("*Bellotti II*"). In *Bellotti II*, the Court expanded upon its holding in *Danforth* by concluding that before the state can compel a pregnant minor to obtain parental consent for an abortion, it must provide an alternative procedure whereby authorization for the abortion can be obtained. *Id.* at 643.

This procedure bypassing the requirement of parental consent could be judicial or administrative, *Id.* at 643 n.22, but must allow the minor to show either:

> (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.

Id. at 643-44. As a further requirement,

> [t]he proceeding . . . must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.

Id. at 644.[7]

Because *Bellotti II* dealt with a consent statute, the Court's decision did not resolve the question whether a bypass procedure would also be required for a parental notice statute. As noted in Justice Stevens' concurrence, "[n]either *Danforth* nor this case determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute

[7] The Court found the Massachusetts statute unconstitutional. See *infra* at 21.

veto." *Id.* at 654 n.1 (Stevens, J. concurring). Since *Bellotti II*, this Court has addressed the constitutionality of several parental intervention statutes. *Hartigan v. Zbaraz*, 484 U.S. 171 (1987), *aff'g by an equally divided court, Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir 1985). (Illinois notification statute); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) ("*Akron I* ") (Akron consent ordinance); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983) (Missouri consent statute); *H.L. v. Matheson*, 450 U.S. 398 (1981) (Utah notification statute). In *Matheson* this Court held that a bypass procedure is *not* required for a parental notice statute insofar as it pertains to immature, unemancipated minors. 450 U.S. at 411 n.17.[8] Moreover, no majority opinion of this Court has held that a mature minor, or one whose best interests would not be served through parental involvement, must be afforded an opportunity to bypass parental notification.

Plaintiffs argue that if this Court were to consider the necessity of a *Bellotti II* bypass procedure for a notice statute, it would effectively render an advisory opinion because the Ohio Statute challenged in this action already contains a bypass procedure. (M.A. at 5). This argument is undercut by the fact that courts have consistently addressed the threshold question of whether a notice statute must contain a judicial bypass before proceeding to analyze whether the notice statute in question satisfies *Bellotti II*. *See Akron II*,

[8] While the dissent in *H. L. v. Matheson*, 450 U.S. 398 (1981) reached the conclusion that notice was the functional equivalent of parental consent, 450 U.S. 437-41 n. 27 (Marshall J., dissenting), the majority found this main premise to be faulty, stating "[i]n *Bellotti II*, however, we expressly declined to equate notice requirements with consent requirements. 443 U.S. at 640, 657." 450 U.S. at 411 n. 17 (Burger, C.J., majority). Justice Stevens in a concurring opinion expressed a willingness to go beyond the majority ruling and expressly declare the parental notification statute constitutional as it applied to all members of the class including mature and emancipated minors. 450 U.S. at 424-25 and n.2 (Stevens J., concurring). *But cf.* 450 U.S. at 420 n.9, (Powell J., concurring) ("Although Bellotti II involved a statute requiring parental consent, the rationale of the plurality opinion with respect to this need [for a bypass procedure] is applicable here.")

854 F.2d at 861, (A-17); *Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985), *aff'd mem.*, 484 U.S. 171 (1987).

Clearly, if a bypass proceeding is not required, it would be unnecessary to address whether Ohio's bypass procedure comports with the standards of *Bellotti II*. Thus, the threshold question that Ohio has presented to the Court is neither an abstract nor a hypothetical question, but rather raises a ripe controversy between the parties that warrants review. *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947). Moreover, as indicated herein, the precedents of this Court compel a finding that due process does not necessitate a judicial bypass proceeding where the state seeks only to compel parental notice.

B. Standard of Review

This court has long recognized that the state has broader authority to regulate the activities of children than those of adults. *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944). The state is entitled to adjust its legal system to account for children's vulnerability and their need for concern, sympathy, and parental attention. *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971). Accordingly, the Court has provided longstanding support for the role of parents in the upbringing of their children. In *Ginsberg*, the Court stated:

> 'It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' The legislature could properly conclude that parents and others . . . who have the primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.

390 U.S. at 639 (citation omitted).

These principles have carried over to this Court's treatment

of state regulations of a minor's right to an abortion. In *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976), the Court recognized that a state has a significant interest in regulating a minor's right to an abortion by encouraging parental involvement in her decision. As stated by Justice Stewart in *Danforth:*

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support.

428 U.S. at 91. The legitimate state interest recognized in *Danforth* has been fundamental to the Court's analysis of all subsequent cases involving state regulation over a minor's abortion decision.

In *Bellotti II*, the plurality opinion noted that a state has a "special interest . . . in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child." *Bellotti II*, 443 U.S. at 639. The plurality further noted three reasons why the constitutional rights of children cannot be equated with those of adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Id.* at 634.

The plurality measured the state's special interest against the burden on a minor's right to seek an abortion imposed by the Massachusetts consent statute. *Id.* at 640. The plurality concluded that the statute was unduly burdensome because it did not allow for a judicial bypass on the basis of maturity and because it required that a parent be given notice of any judicial proceedings brought by a minor to obtain an abortion. *Id.* at 646-650. Four other justices, concurring in the judgment, were of the opinion that the statute was

unconstitutional solely because it subjected every minor's decision to secure an abortion to an absolute third-party veto. *Id.* at 652-656 (Stevens, J., concurring).

Following *Bellotti II*, the Court next considered Utah's parental notification statute in *H.L. v. Matheson*, 450 U.S. 398 (1981). The Utah statute required a physician performing an abortion to notify, if possible, the parents or guardian of a minor. *Id.* at 400. The Court considered this requirement only for a class of immature, unemancipated minors. Id. at 407. Recognizing that parents play an important guiding role in their children's upbringing, which role includes counseling them on important decisions, the Court upheld the constitutionality of the Utah statute because it served the important considerations of family integrity and protecting adolescents, while giving neither parents nor judges a veto power over the minor's decision whether or not to abort. *Id.* at 411-412.

The last cases in which the Court rendered opinions[9] on the constitutionality of parental intervention statutes came in the companion cases of *Akron v Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) ("*Akron I* ") and *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983).

Under consideration in *Akron I* were a number of Akron municipal ordinances, including a consent provision, that provided that no physician could perform an abortion on an unmarried pregnant woman under the age of eighteen without first having obtained informed written consent of the minor and one of her parents or her legal guardian, or the minor first having obtained an order from a court having jurisdiction over her that the abortion be performed or induced. *Akron I*, 462 U.S. at 422 n.4. The Court found the municipal ordinance unconstitutional because the Ohio

[9] *Hartigan v. Zbaraz*, 484 U.S. 171 (1987) was the last parental involvement case to come before the Court, but it was affirmed without opinion by an equally divided panel.

statute governing juvenile proceedings did not give authority to the juvenile courts to inquire into the minor's maturity or best interests. 462 U.S. at 440-41. These statutory shortcomings, coupled with the requirement that the minor's parents be notified once a complaint was filed, lead the Court to conclude "we do not think that the Akron ordinance, as applied in Ohio juvenile proceedings, is reasonably susceptible of being construed to create an 'opportunity for case-by-case evaluation of maturity of pregnant minors.' " 462 U.S. at 441 and n.31 (quoting *Bellotti II*, 443 U.S. at 643 n.23.)

In *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983), the plurality opinion reaffirmed a state's special interest in protecting immature minors from an uninformed abortion decision. 462 U.S. at 490-491. The Court upheld a Missouri consent statute that contained a judicial bypass procedure, which the Court determined could be construed consistently with *Bellotti II*. *Ashcroft*, 462 U.S. at 492. Concurring in the judgment, three other justices voted to uphold the consent requirement on the ground that it did not impose an undue burden on any right that a minor may have to undergo an abortion. *Id.* at 505 (O'Connor, J., concurring in part and dissenting in part).

In *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), this Court again looked to whether state regulation burdened a woman's right to an abortion and for the first time articulated a new test. This Court looked to whether the regulation "permissibly furthers" the state interest. *Id.* at 3057.

Viewing these decisions cumulatively, it is indisputable that a state has a significant interest in protecting a minor from an uninformed abortion decision. States have a concomitant interest in encouraging parental consultation. These interests are deeply rooted in our Nation's history and tradition which recognize that the parental role implies a substantial measure of authority over one's children. *Bellotti II*, 443 U.S. at 638. A state may legislate to promote these interests as long as the legislation permissibly furthers the state's interests and

does not cast an undue burden on a minor's right to an abortion. The constitutionality of a parental notice requirement must be evaluated in light of these standards.

C. Due Process Does Not Require That a Notice Statute Contain a Bypass Procedure

This Court has mandated that consent statutes contain a judicial bypass proceeding because parental consent is viewed as an undue burden upon a minor's abortion decision. Like a parental consent requirement, a parental notice requirement, such as Ohio's, furthers a state's significant interests in protecting pregnant minors and promoting parental consultation.[10] However, unlike parental consent, a parental notice statute does not create an undue burden and thus does not necessitate a judicial bypass proceeding.

Conspicuously absent from the opinion of the Sixth Circuit was any analysis of the extent to which a parental notice requirement burdens a minor's right to an abortion. The Sixth Circuit's conclusion that a bypass proceeding is required in the context of a notice statute rested on the opinions rendered by the Seventh Circuit in *Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983) and *Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd mem.* 484 U.S. 171, (1987).[11] The rationale underlying the conclusion of the lower courts, that a bypass procedure is mandated for a notice statute, is unpersuasive.

In both *Pearson* and *Zbaraz*, the Seventh Circuit concluded

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[10] As indicated herein, the Ohio Statute serves the additional legitimate interest of providing an opportunity for parents to supply essential medical and other information to a physician. See *infra* at 46-47.

[11] The Eighth Circuit in *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*), *cert. granted*, 109 S.Ct. 3240 (1989), likewise found that the *Bellotti II* bypass procedure was required for a notice statute. *Hodgson v. Minnesota*, 853 F.2d at 1453. The Eighth Circuit's conclusion was also unfounded because it was based on an erroneous interpretation of *Akron I* and *Matheson*. *Id.* at 1456-57.

that *Akron I* mandated a judicial bypass for a notification statute. This conclusion is incorrect. *Akron I* involved only the validity of a consent requirement. 462 U.S. at 422 n. 4. Thus, as noted in Justice O'Connor's dissent in *Akron I*, "no decision of this Court has yet held that parental notification in the case of mature minors is unconstitutional." *Id.* at 469 n.12. Furthermore, the Seventh Circuit's decision that similar treatment should be given notification and consent requirements is not reasonable. In *Pearson*, the Seventh Circuit stated that a bypass procedure must be contained in a consent statute "[b]ecause parental involvement brought about by either consent or notification statutes may result in similar efforts by parents to block the abortion . . . " 716 F.2d at 1132. This reasoning assumes that due process requires a bypass procedure in a consent statute because of the concern that parents will attempt to prohibit a minor from proceeding with an abortion.

The fault with the consent statutes invalidated in *Danforth*, *Bellotti II*, and *Akron I* did not lie in the possibility that parents would oppose the minor's decision. The Court recognizes that the profound moral and religious implications of abortion make it a matter that is properly suited for parental involvement. *See supra*, at 20-23. Rather, the fault underlying the statutes was that they allowed for "an absolute and possibly arbitrary veto" over the minor's decision. *Danforth*, 428 U.S. at 74-75.

Accordingly, this Court has expressly declined to equate notice requirements with consent requirements. *Matheson*, 450 U.S. at 411 n.17. Notice is a precondition to a minor's choice to exercise her right but the requirement is not an undue burden because it does not allow parents or a third party to divest a minor of her right to choose. Furthermore, a notice requirement does not become an undue burden because it may create some mental or emotional discomfort for a minor. *See Margaret S. v. Treen*, 597 F. Supp. 636, 652 (E.D. La. 1984) *aff'd*, 794 F.2d 994 (5th Cir. 1986). The potential medical or psychological ramifications from a minor's uninformed abortion decision are just as compelling as those occuring as a result of notifying a parent, if not

more so. *See Matheson,* 450 U.S. at 411 n.20. Thus, the potential burden caused by this initial discomfort connected with disclosure is overridden by the parental role and obligation in childrearing and the minor's need for parental guidance and support.

The lower courts' reasoning also assumes that parents' reactions will be unsupportive and hostile to their minor child. This assumption is without foundation. As relied upon by the Court in *Parham v. J.R.,* 442 U.S. 584, 602-603 (1979), and recognized by Justice Stevens in *Matheson:*

> a state legislature may rationally decide that most parents will, when informed of their daughter's pregnancy, act with her welfare in mind is consistent with the 'pages of human experience that teach that parents generally do act in the child's best interests.'

450 U.S. at 423 n.1; *Danforth,* 428 U.S. at 104. Applying this rationale to the abortion context if a parent is disinclined to believe that the minor should obtain an abortion, it should be presumed that it is because the abortion would not be in her best interest, rather than because of some other malicious motive.

Although the Fourteenth Amendment has been interpreted to embrace a right to privacy that includes a woman's decision of whether to terminate her pregnancy, this privacy interest is not absolute. *Roe v. Wade,* 410 U.S. 113, 154 (1973). Thus, while the Constitution grants a minor the right to an abortion, it does not follow that the Constitution must provide a sanctuary for a minor whose parents may find abortion morally objectionable. Rather, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York,* 390 U.S. 629, 639 (1968). Parents have an important "guiding role" to play in the upbringing of their children which presumptively includes counseling them on important decisions such as abortion. *Matheson,* 450 U.S.

at 410.

Ohio acknowledges that a determination by this Court that parental notice does not create an undue burden, and thus does not necessitate a bypass procedure, would allow other states to enact parental notice requirements applicable to a mature minor or to a minor who may not benefit from parental involvement. The assumption that parental pressure or disapproval might prevent a mature minor from obtaining an abortion is without foundation. "Almost by definition, however, a woman intellectually and emotionally capable of making important decisions without parental assistance also should be capable of ignoring any parental disapproval." *Matheson,* 450 U.S. at 425 n.2. (Stevens, J., concurring in judgment). Even mature minors could gain from the wisdom and emotional support of their parents. This is particularly true in view of the unlikelihood "that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place." *Danforth,* 428 U.S. at 91 (Stewart, J., concurring)(footnote omitted).

Likewise, a statute is not impermissible because some minors may not benefit from parental involvement. As Justice Stevens aptly noted:

> The possibility that some parents will not react with compassion and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her, does not undercut the legitimacy of the State's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.

Matheson, 450 U.S. at 424 (Stevens, J., concurring). Justice Stevens' reasoning is embraced in other areas of juvenile law. Outside of the area of abortion, states have traditionally curtailed the privacy rights of minors by notifying parents in situations that could provoke a negative reaction. For

example, in Ohio, the state notifies parents when a minor child is charged as a truant, a delinquent, an unruly child, or a traffic offender. Ohio Rev. Code Ann. §§3321.19, (a-9), 2151.28(A)(1), (a-3) and (C), (a-4). While parents could react with hostility to the knowledge that their child was acting outside the law, just as they could react hostilely to learning of their daughter's pregnancy, such a possibility does not mandate the necessity for a bypass procedure. A state's "interest in its parental notice statute is not diminished by the fact that there can be no guarantee that meaningful parent-child consultation will actually occur." *Matheson*, 450 U.S. at 424 (Stevens, J., concurring).

While as a matter of public policy a bypass procedure may be advisable for situations in which the minor is sexually abused or the victim of incest, no decision of this Court compels the conclusion that due process mandates including a bypass procedure in a notification statute. A majority of this Court specifically declined to equate notice with consent. The burden imposed by a notice statute is not equal to that imposed by a consent statute. The Ohio Legislature recognized a minor's right to consent to abortion, but wanted to involve parents in their daughter's decision-making. The State sought to give both minors and a concerned parent the information they need to communicate logically and with a view towards the minor's current and future best interest. The State provided an avenue of communication, it is the family's choice to travel it. Unlike a consent statute, the final decision remains with the minor.

II. THE JUDICIAL BYPASS PROCEDURE PROVIDED BY THE OHIO PARENTAL NOTIFICATION STATUTE IS CONSISTENT WITH THE DICTATES OF THIS COURT AND ENSURES THE DUE PROCESS RIGHTS OF A MINOR SEEKING AN ABORTION WITHOUT PARENTAL NOTIFICATION.

In the event this Court finds a bypass procedure is not mandated under the United States Constitution in a notice statute, this ends the inquiry. However, if this Court

determines that the Ohio Statute must be analyzed under the bypass standards of *Bellotti II*, then it must be recognized that this appeal emanates from Plaintiffs' facial challenge to the constitutionality of Ohio's Statute. *See Akron II*, 633 F. Supp. at 1126, (A-61). A facial challenge to a legislative act is the most difficult to advance " 'since the challenger must establish that no set of circumstances exists under which the Act would be valid.' " *Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3060 (O'Conner, J., concurring) (quoting, *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The fact that the Ohio Statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since the Court has not recognized an overbreadth doctrine outside the limited context of the First Amendment. *See Schall v. Martin*, 467 U.S. 253, 269 (1984); *New York v. Ferber*, 458 U.S. 747, 769 (1982).

Statutes must be interpreted in a manner that avoids constitutional difficulties. *Webster v. Reproductive Health Services*, 109 S.Ct. at 3060; *Frisby v. Schultz*, 108 S.Ct. 2495, 2504 (1988); *New York State Ass'n v. City of New York*, 108 S.Ct. 2225, 2233 (1988). If one among alternative constructions would involve serious constitutional difficulties that interpretation should be rejected in favor of another. *United States v. Clark*, 445 U.S. 23, 33-34 (1980). While no Ohio court has addressed this Statute,[12] a constitutional analysis of the Statute must proceed in light of these fundamental principles of statutory construction.

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[12] The Ohio Supreme Court enacted Rule XVI, (a-9), (effective July 15, 1988), which allows federal courts to certify a constitutional question to the Ohio Supreme Court. This case was briefed and argued in the court below prior to the effective date of Rule XVI, and consequently the issue of certification was not considered below. However, as noted by this Court in *Ashcroft*, "where, as here, a statute is susceptible to a fair construction that obviates the need to have the state courts render the saving construction, there is no reason for the federal courts to abstain." 462 U.S. at 493 n. 21.

A. Confidentiality

The plurality opinion in *Bellotti II* states that a bypass procedure, and any subsequent appeals, must be completed with anonymity. *Bellotti II*, 443 U.S. at 644. The judicial bypass procedure outlined by the plurality opinion in *Bellotti II* was later endorsed by a majority of the Court in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-93 (1983) and *Akron I*, 462 U.S. 416, 438-40 (1983).

The Ohio Statute precludes the juvenile court from notifying the complainant's parents that she is pregnant or that she desires to have an abortion. Ohio Rev. Code Ann. §2151.85(D), (A-41). The Statute further provides that all hearings and appeals are to be conducted in a manner that preserves the anonymity of the complainant. Ohio Rev. Code Ann. §§2151.85(F), (A-41) and 2505.073(B), (A-45-46). The Statute also mandates that all records be kept confidential and exempts such records from the purview of the Ohio Public Records Act. *Id.*

The Ohio Supreme Court has drafted complaint forms and a cover letter in accordance with the Act's confidentiality requirements. (JA-6-14). The instructions attached to the complaint forms, in relevant part, read as follows:

> CONFIDENTIALITY: The confidentiality of this proceeding will be maintained by the court, its officers and employees. In order to preserve this confidentiality, the court will consider your name to be Jane Doe and, in all proceedings and documents, will refer to you as Jane Doe or complainant. If you do not have an attorney, you must, however, sign your real name at the end of the complaint and give *an address* where the court can contact you throughout this proceeding.

(JA-3)(emphasis added). The complaint form instructs the minor that she may proceed under a pseudonym, but must provide the court with her real name and provide an address where she can be contacted, if she is not represented by

counsel. The lower court held that the Statute did not comply with the *Bellotti II* confidentiality requirements because the minor is required to sign her name at the end of the petition and to provide an address where she can be reached unless she is represented by an attorney. *Akron II*, 854 F.2d at 865, (A-26). Contrary to the lower court's finding, nothing requires or suggests that the address she provides for contact must be her parents' home. *Akron II*, 633 F. Supp. at 1144, (A-96). It is logical to assume the clinic or physician's address will be the address most often provided on the complaint forms if no counsel has yet been retained or appointed.

The Ohio Statute is similar to the Missouri statute that passed constitutional scrutiny in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 416 (1983). In *Ashcroft*, the challenged statute allowed the minor to use her initials on the petition but also required that the petition be signed by the minor or her next friend. 462 U.S. at 479 n.4. The statute further mandated that the minor provide the names and addresses of each of her parents. *Id.* The Sixth Circuit stated that the *Ashcroft* decision did not consider the impact of the signature and parental disclosure provisions and that *Ashcroft* was limited to approving only the use of initials in a bypass proceeding. *Akron II*, 854 F.2d at 865 n.62, (A-25). This analysis is belied by the plain language of the signature and parental disclosure provisions in the Missouri statute. One can infer from this Court's silence on the signature and parental disclosure provisions that such requirements did not jeopardize the confidentiality of the proceeding.

Even assuming *Ashcroft* is limited to approval of the minor's initials on the complaint form, the Sixth Circuit still erred in finding that the Ohio Statute does not provide sufficient safeguards for confidentiality. The lower court presumed that court personnel would not adhere to the Act's confidentiality requirement. This conclusion is without foundation. The Statute prohibits the minor's parents from being notified of the proceedings and protects the proceedings and all records from public disclosure. Ohio Rev. Code Ann. §2151.85 (D) and (F), (A-41). Ohio ethics laws subject court personnel who violate the confidentiality of proceedings to criminal

liability. Ohio Rev. Code Ann. §102.03(B) (a-2). A violation of the ethics laws is a misdemeanor of the first degree. Ohio Revised Code Ann. §§102.03(B), (a-2); 102.99(B), (a-3).[13]

In this facial challenge, no claim can be made that court personnel in the State of Ohio will violate the privacy of a minor. A similar claim was rejected by this Court in a facial challenge to Missouri's statute in *Ashcroft*, where this Court stated "[t]here is no reason to believe that [the state] will not expedite any appeal consistent with the mandate in our prior opinions." *Ashcroft*, 462 U.S. 492 n. 16. Likewise in the area of confidentiality, there is no reason to believe that the Ohio courts will not zealously protect the confidentiality of the minor consistent with the mandates of this Court and the Ohio Legislature.

Moreover, the Sixth Circuit failed to articulate any manner in which the Act's signature requirement would endanger the confidentiality of the proceedings. Such a presumption is plainly inconsistent with the maxim of statutory construction, that statutes are to be construed, if possible, to avoid constitutional difficulties. *Frisby v. Schultz*, 108 S.Ct. 2495, 2504 (1988). With this principle in mind, a more valid presumption is that court personnel will comply with Ohio ethics laws and respect the privacy of any documents filed by the pregnant minor. Additionally, based on the brief time-frames envisioned by the Statute, it is likely that minors will be provided with an attorney upon arrival at the courthouse, since the Ohio Statute provides the minor a right to counsel at the hearing. Ohio Rev. Code Ann. §2151.85(B)(2), (A-39). Therefore, the lower court should have recognized that most minors will have a lawyer file the complaint and thus will never have to provide a signature.

In short, the Sixth Circuit envisioned the worst possible scenario in reviewing the Act's confidentiality provisions.

[13] Under Ohio law a first degree misdemeanor is punishable by a fine of not more than one thousand dollars and not more than six months imprisonment. Ohio Rev. Code Ann. §2929.21(B)(1) and (C)(1), (a-8).

Such an analysis runs afoul of this Court's pronouncements regarding statutory construction. Giving proper deference to the Act's confidentiality provisions compels the conclusion that it satisfies the *Belotti II* confidentiality requirements.

B. Expedition and Constructive Authorization

Bellotti II states that the bypass proceeding is to be held with "sufficient expedition to provide an effective opportunity for an abortion to be obtained." 443 U.S. at 644. The lower court acknowledged that this Court has not set an absolute limit on the number of days that a bypass proceeding can consume, *Akron II*, 854 F.2d at 867, (A-30), but nevertheless, concluded the Ohio Statute did not satisfy the *Bellotti II* expedition requirements based on its determination that the Act's bypass procedure could span a maximum of twenty-two (22) days.[14]

[14] The Sixth Circuit adopted the district court's conclusion that the procedure would span a maximum of approximately three weeks or twenty-two days. *Akron II*, 854 F.2d at 866, (A-28). However, this interpretation assumes that the term "days," as used in Ohio Rev. Code Ann. §2505.073, (A-44), which specifies the time periods for docketing and deciding the appeal, means "business days" as opposed to "calendar days." *Akron II*, 633 F. Supp. at 1141, (A-92). This assumption is erroneous. The absence of the term "business" from the appellate review portion of the act evinces the legislature's intent that such portions should be construed as calendar days.

The juvenile court must hold its hearing "at the earliest possible time, but no later than the fifth *business* day after the complaint is filed." Ohio Revised Code Ann. §2151.85(B)(1), (A-39) (emphasis added). The juvenile court must then enter its judgment immediately after the hearing. *Id.* This time period as calculated before the juvenile court refers to business days and would be exclusive of weekends and legal holidays. *See* Ohio Rev. Code. Ann. §1.14 (Anderson 1988) (a-1); Ohio R. Juv. P. 18(A) (a-13). The time-frame from the date of filing to decision from the juvenile court, assuming the imposition of a weekend, would be a maximum of seven days.

An appeal by a minor of an adverse judgment entered by the juvenile court, must be docketed within four days of the filing of the notice of appeal. Ohio Rev. Code. Ann. §2505.073(A), (A-44). This subdivision mandates that the court shall permit briefs to be filed within four days after the appeal is docketed; entertain oral arguments within five days

Even assuming the lower court was correct in its calculation, a three week time period inclusive of deliberation time at both the trial and appellate levels is consistent with the statute upheld in *Ashcroft*. 462 U.S. at 479 n. 4. The Missouri statute approved by this Court contained a bypass procedure spanning sixteen or seventeen days *plus* a sufficient period of time for deliberation and decision-making at both the trial and appellate levels. 462 U.S. at 491 n.16. The Missouri statute, consequently, could easily be construed as consuming a period of more than twenty days. *Id.* In light of the fact that the Ohio bypass procedure could reasonably be interpreted to span no more than twenty-two days inclusive of deliberation, it was unreasonable for the lower court to conclude, based on *Ashcroft*, that the Statute is not sufficiently expedient.

Likewise, there is no reason to believe that Ohio courts will not expedite bypass proceedings upon a showing by the minor that her right to an abortion may be jeopardized through further delay. The statutory provision allows Ohio courts to shorten the maximum time limits based on a

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[13] *cont.*

after the appeal is docketed; and enter judgment immediately after oral argument. *Id.* The maximum period of time for appellate review is a total of nine days; four days to docket the appeal and five days for review and decision. Since Ohio Rev. Code Ann. §2505.073, (A-44), does not refer to business days, time would be computed by the Ohio courts based on each calendar day. This would not exclude weekends or legal holidays, and results in a bypass procedure, inclusive of deliberation time at both the trial and appellate levels combined, of a maximum period of sixteen days. If the minor's filing with the juvenile court occurs during a week containing a legal holiday, the time period could be extended by as much as one to three days.

Ohio R. App. P. 14(A), (a-11), provides that computation of time, less than seven days, does not include intermediate weekends or legal holidays. However, the juvenile and appellate provisions of the Ohio Statute must be read *in pari materia* to give full effect to the expedition provisions of the Ohio Statute. *Bobb v. Marchant*, 14 Ohio St. 3d 1, 469 N.E. 2d 847 (1984). If the time periods in Ohio Revised Code Ann. §2505.073, (A-44), were construed as "calendar" days rather than "business" days, the maximum time period would be shortened approximately five days from the lower court's calculations, to sixteen days, for completion of the bypass proceeding.

a showing of good cause. Ohio Rev. Code Ann. §2505.073(A), (A-45). This provision is similar to the Missouri statute reviewed in *Ashcroft* which stated that the supreme court of the state was to provide for expedited appellate review. *Ashcroft*, 462 U.S. at 479 n.4. With respect to this provision, this Court stated "[t]here is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions." *Id.* at 492 n.16. Construing the statute in this manner neutralizes the Sixth Circuit's concern that the bypass proceeding will not be completed until the minor is in a problematic stage of her pregnancy. *Akron II*, 854 F.2d at 867-68, (A-30-31).

Since the Court in *Ashcroft* did not examine the time-frame for judicial decision-making, the question of how to proceed if the decision-maker fails to act was not considered. The Ohio Statute's constructive authorization provision squarely addresses this matter, allowing a physician to perform an abortion where the court has not acted as mandated by the Statute. Ohio Revised Code Ann. §§2151.85(B)(1), (A-39), and 2505.073(A), (A-45).

The constructive authorization provision (also referred to as "pocket approval" or "pocket veto") allows a physician to proceed with an abortion if either the juvenile court or the court of appeals fails to act on the minor's complaint or appeal within five days. *Id.* The legislature designed this provision to protect a minor's right to an expeditious disposition of her petition. The Sixth Circuit found that this same provision placed an undue burden on a minor's right to an abortion based on the belief that physicians would be unwilling to proceed with an abortion without a tangible order. *Akron II*, 854 F.2d at 868, (A-32-33).

Rather than construing this Statute in a favorable light, the lower court speculated that no tangible proof of the juvenile or appellate courts' inaction would be available and that, absent such proof, a physician would be unwilling to perform an abortion on a minor. Such speculation plainly violates the maxim that statutes are to be interpreted in a manner that avoids constitutional difficulties. *Webster v.*

Reproductive Health Services, 109 S.Ct. at 3054. Moreover, on a facial challenge the lower court had an obligation, prior to declaring the provision unconstitutional, to determine that "no set of circumstances exist under which the Act would be valid." *Id.* at 3060 (O'Connor J., concurring) (quoting *United States v. Salerno,* 481 U.S. 739, 745 (1987)).

Viewing the Statute in a constitutional light shows that the Sixth Circuit erred in its analysis. Nothing in the Statute would prevent either the juvenile or appellate court from responding to inquiries from the minor or her counsel, if retained or appointed, and providing certified documentation that could assure a physician that constructive authorization under the Statute had occurred.[15] Date-stamped copies of the complaint and a document such as a copy of the court's docket sheet showing no entry could easily be provided upon request. These documents could then be utilized to assure the treating physician that the performance of an abortion on a minor patient was in conformity with Ohio law. In addition, the Statute in no way prevents a treating physician from contacting the minor's counsel to obtain the relevant information to assure that constructive authorization has occurred.

The constructive authorization can be enforced without any resulting burden placed on the minor. For the lower court to conclude that the pocket approval will result in confusion and facilitate delay, *Akron II,* 854 F.2d at 868, (A-33), is plain error. The constructive authorization provides a deadline for the court, and assures that the time available for the decision-maker to act is limited to five days at each level of review. This provision favors the minor by not permitting the court to delay indefinitely a decision as to the minor's petition. In all cases, the minor, either by the court's action or inaction, will have a final disposition on

[15] A minor has a right to counsel, which arises in accordance with Ohio R. Juv. P. 4(A) (a-13) at the time when the minor becomes a party to a juvenile court proceeding. *See also* Ohio Revised Code Ann. §§2151.352, (a-5), and 2151.85(B)(2), (A-39).

her petition within a specified time period. Even under the most unfavorable calculation of the Ohio Statute reached by the lower court, final disposition on a minor's petition would still be achieved within a maximum of twenty-two days. This time-frame, albeit not the only interpretation that could be given to the Statute, can hardly be characterized as an undue burden.

C. Pleading Forms

The *Bellotti II* bypass proceeding must afford a minor the opportunity to show that she is mature enough to make the decision of whether to terminate her pregnancy on her own or that parental intervention would not serve her best interests. 443 U.S. at 647. Writing for the plurality in *Bellotti II,* Justice Powell stated:

> If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests.

Id.

The Sixth Circuit held that the pleading framework in the Ohio Statute imposes an undue burden on a minor's right to show that she falls within one of the two categories enumerated in *Bellotti II. Akron II,* 854 F.2d at 862-63, (A-20-21). This conclusion is without merit.

The Statute allows a minor to raise both issues set forth in *Bellotti II.* The Statute provides that the minor shall file a complaint that contains *either or both* of the following allegations:

> (a) THAT THE COMPLAINANT IS SUFFICIENTLY MATURE AND WELL ENOUGH INFORMED TO INTELLIGENTLY DECIDE WHETHER TO HAVE AN ABORTION WITHOUT THE NOTIFICATION OF HER PARENTS, GUARDIAN, OR CUSTODIAN;
>
> (b) THAT ONE OR BOTH OF HER PARENTS, HER GUARDIAN, OR HER CUSTODIAN WAS ENGAGED IN A PATTERN OF PHYSICAL, SEXUAL, OR EMOTIONAL ABUSE AGAINST HER, OR THAT THE NOTIFICATION OF HER PARENTS, GUARDIAN, OR CUSTODIAN OTHERWISE IS NOT IN HER BEST INTEREST.

Ohio Rev. Code Ann. §2151.85(A)(4)(a) and (b), (A-38-39).

The Statute further provides that if the minor alleges only maturity, the court will grant or deny the complaint based on this allegation. Ohio Rev. Code Ann. §2151.85(C)(1), (A-40). Likewise, if the minor alleges only that parental notice would not be in her best interest, the court will grant or deny the complaint based on this allegation. Ohio Rev. Code Ann. §2151.85(C)(2), (A-40). However, if the minor alleges that she falls within both categories, the court will consider both. Ohio Rev. Code Ann. §2151.85(C)(3), (A-40-41).

The Ohio Supreme Court has issued forms that effectuate the Act's pleading requirements. Complaint Form A contains a statement that she is sufficiently mature and well enough informed to intelligently decide to terminate the pregnancy; Complaint Form B contains the allegation that notification of a parent is not in her best interest; and Complaint Form C contains both allegations. (JA-6-14).

The Sixth Circuit found that the pleading forms were a "procedural trap," which would somehow jeopardize the minor's right to demonstrate that notification would not be in her best interest. *Akron II,* 854 F.2d at 863, (A-20). The court stated that "the complainant is not in a position to determine whether the juvenile court will be persuaded as to her maturity until long past the pleading stage." *Id.* This

reasoning is flawed.

First, as indicated in Form C, a minor has the opportunity to raise both maturity and best interest claims. The use of alternate pleading forms merely streamlines the claims to be raised prior to the hearing in the event the minor does not have legitimate claims for both categories.

Second, there are procedural safeguards that obviate any possibility that a minor will lose her opportunity to raise a legitimate claim because she mistakenly filed the wrong form or did not realize what factors were relevant to her case. From the outset, the forms make the minor's task as simple as possible by providing clear, accurate instructions as to how the minor is to go about choosing the proper form. The instructions state:

> **Choice of form:** The complaint form that you choose depends upon your reason for seeking an abortion without notifying one of your parents, guardian or custodian.
> If you believe that you are able to decide for yourself whether or not to have an abortion, use **Form A.**
> If you believe that it is in your best interest to have an abortion without notifying one of your parents, guardian or custodian, use **Form B.**
> If you believe that you are able to decide for yourself whether or not to have an abortion **and** that it is in your best interest to have an abortion without notifying one of your parents, guardian or custodian use **Form C.**

(JA-3).

Moreover, all complainants who have not retained counsel are appointed counsel by the court. Ohio Revised Code Ann. §2151.85(B)(2), (A-40). This statutory scheme avoids the situation that could be created if the court had to discern what, if any, claims the minor has.

Third, the Sixth Circuit's rationale presumes that once a

pleading is filed the minor cannot amend earlier filed pleadings. However, Rule 22(B) of the Rules of Juvenile Procedure (a-14) permits pleadings to be liberally amended.[16] "[A] liberal amendment policy is within the spirit of the civil rules which prefers a resolution of cases on their merits, and not on pleading deficiencies." *Hambleton v. R. G. Barry Corp.*, 12 Ohio St. 3d 179, 465 N.E.2d 1298 (1984), (*citing, Peterson v. Teodosio*, 34 Ohio St. 2d 161, 297 N.E. 2d 113 (1973)). *See In re Bainbridge*, 1988 Ohio App. LEXIS 2569 (Lorain Cty. June 29, 1988). Nothing in the Statute would interfere with application of this rule. There is no reason to believe that a minor or her counsel would not be permitted to amend her pleading even as late as the hearing.

Finally, the Sixth Circuit's analysis suggests that Ohio's pleading framework is invalid by the mere fact that the scope of the hearing is limited to the claims raised in the pleading.[17] This analysis misses the point of *Bellotti II*. *Bellotti II* requires that a minor must be given an opportunity to raise both the issues of maturity and best interest. The Ohio Statute provides the opportunity to raise these issues by the filing of complaint forms. However, the bypass proceeding contemplated by this Court was not meant to be a fishing expedition. Such an unfocused proceeding would frustrate the state's interests in facilitating parental involvement and protecting minors from an uninformed, rash decision. The bypass proceeding is designed to consider legitimate reasons why the minor should not be required to notify her parents. It is inconceivable that a minor, with the assistance of counsel, would not be able to ascertain what legitimate claims she has and file the corresponding form.

In declaring Ohio's pleading requirements unconsti-

[16] Ohio R. Juv. P. 22(B) (a-14) parallels Ohio R. Civ. P. 15(A) (a-12) which permits liberal amendment of civil pleadings.

[17] Of course, nothing in the Statute would prevent the court from, *sua sponte* broadening the scope of the hearing in the event the minor raised only one of the two *Bellotti II* bypass issues.

tutional, the Sixth Circuit did not accord proper deference to the Ohio Legislature's judgment that this framework would be the most efficient way of initiating the bypass procedure. Moreover, the lower court once again looked for, rather than avoided, constitutional difficulties. Ohio's pleading requirements must, therefore, be upheld.

D. Burden of Proof

In order to proceed with an abortion without notifying one of her parents, the Ohio Statute requires the minor to demonstrate by "clear and convincing" evidence that she is sufficiently mature to make her own decision or that parental notification would not be in her best interest. Ohio Rev. Code. Ann. §2151.85(C)(1), (C)(2), and (C)(3), (A-40-41). The lower court's conclusion that the clear and convincing burden of proof violated a minor's due process rights fails to give proper deference to legislative decision-making and the state interests involved.[18] *Akron II*, 854 F.2d at 864, (A-23). Due process is flexible and calls for such procedural protections as the particular governmental and private interests demand. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The lower court, in reaching its conclusion that the Statute's "clear and convincing" standard of proof violated a minor's right to due process, relied on standards set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976) and its progeny. *Akron II*, 854 F.2d at 863-64, (A-21-22). In *Mathews*, the plaintiff challenged the constitutionality of administrative procedures employed by the Secretary of Health, Education, and Welfare for determining eligibility to continue disability benefits. *Mathews*, 424 U.S. at 335; *see also, Santosky v. Kramer*, 455 U.S. 745, 755 (1982). The Court held that such benefits could be removed without a pretermination hearing. *Mathews*, 424 U.S. at 349. This conclusion resulted from

[18] Neither of the lower courts rendered any opinion regarding what burden of proof in a waiver proceeding would be constitutional. *Akron II*, 854 F.2d at 864. (A-23); *Akron II*, 633 F. Supp. at 1137, n.5, (A-83).

balancing the following factors: (1) the private interests affected by the proceedings; (2) the risk of an erroneous deprivation of such interest; and (3) the governmental interest advanced by use of the challenged procedure. *Id.* at 335. This Court has applied the factors enumerated in *Mathews* when addressing whether a required standard of proof comports with procedural due process. *Santosky v. Kramer*, 455 U.S. 745 (1982); *Addington v. Texas*, 441 U.S. 418 (1979).

In *Addington*, the plaintiff challenged the use of a "clear, unequivocal, and convincing" standard of proof in an involuntary commitment case. The plaintiff argued that the state should have been required to prove his mental illness "beyond a reasonable doubt." 441 U.S. at 422. The Court rejected this argument, finding that due process only required a "clear and convincing" standard. *Id.* at 431-33.

In *Santosky*, this Court addressed the burden of proof that a state must meet in order to terminate parental rights pursuant to a parental neglect statute. The Court invalidated the state's "preponderance of the evidence" standard and held the state must show by "clear and convincing" evidence that a child has been permanently neglected by his natural parents. *Santosky*, 455 U.S. at 759, 762-68. This Court stressed that "[t]he state's ability to assemble its case almost inevitably dwarfs the parent's ability to mount a defense," thereby creating a significant risk of error when coupled with the "preponderance of the evidence" standard. *Id.* at 763.

Applying the *Mathews* test to the instant case, the lower court stated that "the risk of erroneous deprivation of the mature minor's constitutional right to proceed without parental intervention is significantly increased by the imposition of the clear and convincing standard of proof." *Akron II*, 854 F.2d at 864, (A-23). Based on this finding, the lower court concluded that the "clear and convincing" standard of proof imposed an undue burden on the minor's right to seek an abortion. *Id.* Such a conclusion is unwarranted.

Unlike the procedures challenged in *Mathews*, *Addington*, and *Santosky*, Ohio's nonadversarial bypass procedure is not a state-initiated proceeding.[19] Indeed, no individual or officer of the court is assigned to oppose a minor's petition. The state would not be represented at a bypass hearing and the only evidence submitted for the juvenile court's consideration would be the minor's evidence. Thus, there is no concern that the minor's case will be dwarfed by the resources of the state. *See Santosky v. Kramer*, 455 U.S. at 764.

In addition, as the lower court recognized, the state has a legitimate interest in the reliability of the proceeding to ensure that an immature minor, or a minor whose best interest would be served by parental consultation, does not proceed with such a grave decision without parental consultation.[20] *Akron II*, 854 F.2d at 864, (A-22-23). The Ohio juvenile courts employ the clear and convincing standard of proof in other contexts where constitutional rights are at risk.[21]

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[19] The plurality opinion of *Bellotti II* recognized the waiver proceeding was not meant to be a formal or adversarial proceeding. 443 U.S. at 643 n. 22.

[20] The Sixth Circuit rebuffed Ohio's assertion that it had an interest in facilitating parental involvement. *Akron II*, 854 F.2d at 863, (A-22). However, where third parties could be affected by the outcome of the proceeding, it may be appropriate to consider their interests for purposes of the *Mathews* test. *See Santosky*, 455 U.S. 790-91 (Rehnquist, J., dissenting) (interests of children in parental neglect proceedings should be considered for purposes of determining appropriate standard of proof).

[21] In essence, the bypass procedure is used to temporarily terminate the parents' rights to the custody, care and nurture of their minor daughter. While the rights of parenthood are not beyond limitation, *Prince v. Massachusetts*, 321 U.S. at 166, before the state can sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least "clear and convincing evidence." *Santosky v. Kramer*, 455 U.S. 745, 769 (1982). Ohio uses a clear and convincing standard of proof in actions that temporarily and permanently terminate parental rights. *See, e.g., In re Adoption of Bovett*, 33 Ohio St. 3d 102, 515 N.E.2d 919 (1987)

The Ohio Legislature has determined that the best way to advance the State's interest is through a "clear and convincing" standard of proof. This legislative judgment is one that affects the fairness of the procedure and thus is entitled to a strong presumption of validity. *See, e.g., Schweiker v. McClure*, 456 U.S. 188, 200 (1982).
[21]

Furthermore, the determination or need for a hearing requires a weighing of the interests involved. In a notification statute a minor's right to choose whether to abort is not the interest at stake.[22] Even if unsuccessful in the bypass procedure, ultimately the minor must decide what is right for herself. Consequently, the interest at issue, as correctly recognized by the Sixth Circuit, is the mature minor's right to proceed with an abortion without parental intervention. *Akron II*, 854 F.2d at 863, (A-22). Where no parental veto power exists to override a minor's decision, the state's interest in providing information to those individuals charged with the responsibility for providing a guiding role in the upbringing of their children outweighs the minor's right to privacy.

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[21] *cont.*
(the petitioner for an adoption without parental consent must prove by clear and convincing evidence that the natural parent has failed to support the child for one year without justifiable cause); *In re Adoption of Holcomb*, 18 Ohio St. 3d 361, 481 N.E.2d 681 (1985) (the petitioner for an adoption without the parent's consent has the burden of proving by clear and convincing evidence that the natural parent has failed to communicate with the child for one year without justifiable cause); *In re Willmann*, 24 Ohio App. 3d 191, 493 N.E.2d 1380 (Hamilton Cty. 1986) (in an action seeking temporary custody of a child who is alleged dependent, the clear and convincing standard of proof is utilized in the adjudicatory portion of the proceedings terminating parents' rights).

[22] The district court incorrectly found that "[t]he waiver procedure required in a parental notification statute will balance a minor woman's constitutional right to choose to abort against the state's interest in promoting family harmony and in insuring that she is fully informed." *Akron II*, 633 F. Supp. at 1136, (A-82). These basic interests were recognized in *Bellotti II*, 443 U.S. at 643, to underlie the need for a bypass procedure where a parent possessed a veto power over the minor's decision-making.

Procedural safeguards contained in the Ohio Statute further support the conclusion that the "clear and convincing" standard does not abridge a minor's right to an abortion. Specifically, the Statute provides that the juvenile court must appoint a guardian ad litem for the minor and an attorney if she has not already retained one. Ohio Rev. Code Ann. §2151.85(B)(2), (A-39-40). Moreover, the minor has the right to an expedited appeal from an adverse decision. Ohio Rev. Code Ann. §2505.073, (A-44).

Given these procedural safeguards, the reduced private interests at stake, and the *ex parte* nature of the bypass proceeding, the Sixth Circuit clearly overreached in finding that the "clear and convincing" standard would lead to an erroneous deprivation of a mature minor's constitutional rights. Furthermore, proper deference to the judgment of the Ohio Legislature and Ohio law compels the conclusion that the Act's standard of proof requirement is constitutional.

III. THE OHIO STATUTE'S REQUIREMENT THAT A PHYSICIAN NOTIFY ONE PARENT OF A MINOR'S ABORTION DECISION IMPOSES NO UNDUE BURDEN UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Ohio Statute provides that the person who will perform the abortion on a minor must notify the minor's parents of her decision. Ohio Rev. Code Ann. §2919.12(B), (A-46). The Sixth Circuit held that this requirement imposed an undue burden on a minor's right to seek an abortion based on this Court's ruling in *Akron I*. *Akron II*, 854 F.2d at 862 (A-19). The Sixth Circuit's reliance on *Akron I* is misplaced.

In *Akron I*, the Court invalidated an informed consent provision that required a physician to disclose the particular risks of a woman's pregnancy, the abortion technique to be used, and general instructions on proper post-abortion

care.[23] *Akron I*, 462 U.S. at 446-47. The Court found that requiring a physician to convey this information did not further the state's interest in ensuring that a woman's consent is informed and unpressured. The Court reasoned that the woman's consent would be appropriately informed if a physician delegated the counseling task to another qualified individual. *Id.* at 448.

Ohio's physician notice requirement is readily distinguishable from the ordinance struck down in *Akron I*. The ordinance in *Akron I* applied to all women seeking abortions, regardless of age, and its purpose was only to ensure that a woman's consent to an abortion was informed and made without pressure. Ohio's physician notice requirement applies only to minors, and thus the Statute serves interests other than ensuring that the abortion decision is made with informed consent. Moreover, Ohio's requirement of direct physician contact is warranted by its significant interests in protecting a minor and promoting parental involvement.

The Statute protects minors "by providing an opportunity for parents to supply essential medical and other information to a physician." *Matheson*, 450 U.S. 398, 411 (1981). The state legitimately may seek to ensure that the decision has been made "in the light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient." *Colautti v. Franklin*, 439 U.S. 379, 394 (1979). It is reasonable to suggest that in many instances a minor may be unaware of her medical history in sufficient detail to provide data relevant

[23] The Court invalidated another informed consent provision that required the physician to disclose the status of the woman's pregnancy, the development of her fetus, the date of possible viability, potential physical and emotional complications of an abortion, and information on birth control, adoption and childbirth. *Akron I*, 462 U.S. at 442. The Court invalidated this provision on the ground that it attempted to discourage a woman from having an abortion and because it intruded in a physician's judgment. These factors, however did not enter into the Sixth Circuit's analysis of Ohio's physician notice requirement.

to allergies, drug reactions, past diseases, family history, and current or past psychological disorders for the physician to adequately assess the risks of surgery and need for post-operative services. The minor may be unaware of this type of information because, until her pregnancy, these conditions were not directly relevant to her health. Allowing an abortion to proceed without such information could result in disastrous consequences. As this Court stated in *Matheson:*

> The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.

Id. at 411. (footnote omitted).

The Ohio Legislature concluded that the physician, rather than a subordinate,[24] is the individual most capable of obtaining family medical history, psychological history, and of asking any necessary follow-up questions. To statutorily delegate this responsibility to a subordinate would minimize the import of the notification process. Due deference must be given to the choices made by the state legislature in enacting narrowly tailored laws to protect legitimate state interests. *Akron I*, 462 U.S. at 434; *Matheson*, 450 U.S. at 413. Ohio's physician notice requirement is narrowly tailored since it applies only to an immature, unemancipated minor. As noted in *Matheson*, a state's interest in ensuring that a physician has all pertinent background information on a minor who falls into this class is particularly significant.

[24] Although an earlier argument focused on the minimal time and cost involved in the physician consultation, this in no way diminishes the importance of a *physician* effectuating notice.

Matheson, 450 U.S. at 411. The Sixth Circuit clearly erred in finding that Ohio did not have an interest that warranted direct physician contact.

The Sixth Circuit further erred in concluding that the physician notice requirement would not further the state's interest in fostering parental involvement in the minor's abortion decision. The transfer of information between physician and parent would not likely be one-sided. It is reasonable to expect the parent to have questions and concerns that could easily surpass the limited knowledge of any subordinate. The attending physician could provide the parent with the generalized statistical risks for the abortion procedure, as well as the specific risks of a full term pregnancy for the minor in question. Thus, information received by the parent would be beneficial to discussions between parent and child.

The reasoning employed by the district court is also erroneous. The district court determined the state's interest to be "minimal" and speculated that physician involvement "*may* add to the cost of the abortion procedure". *Akron II*, 633 F. Supp. at 1135, (A-79), (emphasis added). The alleged increase in cost referred to by the district court is not supported by the record before this Court. No evidence was admitted in this facial attack upon Ohio's Statute that would buttress the district court's conclusion that an increase in cost would be associated with notification. The time spent by a physician telephoning a parent would not necessarily add to the actual cost of an abortion and it cannot automatically be assumed that such cost would necessarily be passed on to the minor. Furthermore, such reasoning is plainly inconsistent with *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), where this Court upheld the constitutionality of a required viability testing procedure which would unquestionably increase the cost of an abortion. *Webster*, *Id.* at 3057.

It is apparent that both lower courts failed to accord proper deference to the judgment of the Ohio Legislature. When reviewing state regulation of abortion the Court needs to

examine whether the regulation permissibly furthers the declared state interest. *Id.* Here, requiring the physician to notify the parent permissibly furthers Ohio's interest in facilitating informed parental involvement in the minor's abortion decision. This requirement also broadens the physician's capacity to make a reasonable medical judgment. Even in the context of *Akron I*, the Court clarified that "we do not imply that a physician may abdicate his essential role as the person ultimately responsible for the medical aspects of the decision to perform the abortion." *Akron I*, 462 U.S. at 448 (footnote omitted).

Requiring the physician to effectuate notification permissibly furthers the State of Ohio's interest in protecting minors because, unlike *Akron I*, the state seeks to promote an exchange of information particularly within the knowledge and expertise of the physician. This exchange of information will serve the corresponding state interest of facilitating informed parental involvement in the minor's decision of whether to terminate her pregnancy. The Sixth Circuit erred in concluding otherwise.

CONCLUSION

The decision of the Sixth Circuit should be reversed as it pertains to the portions of Ohio's Statute found unconstitutional.

Respectfully submitted,

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August 28, 1989

APPENDIX TO BRIEF FOR APPELLANT

OHIO REVISED CODE § 1.14

First day excluded and last day included in computing time; exceptions; legal holiday defined.

The time within which an act is required by law to be done shall be computed by excluding the first and including the last day; except that when the last day falls on Sunday or a legal holiday, then the act may be done on the next succeeding day which is not Sunday or a legal holiday.

When a public office in which an act, required by law, is to be performed is closed to the public for the entire day which constitutes the last day for doing such act or before its usual closing time on such day, then such act may be performed on the next succeeding day which is not a Sunday or a legal holiday as defined in this section.

"Legal holiday" as used in this section means the following days:

(A) The first day of January, known as New Year's day;

(B) The third Monday in January, known as Martin Luther King day;

(C) The third Monday in February, known as Washington-Lincoln day;

(D) The thirtieth day of May, known as Decoration or Memorial day;

(E) The fourth day of July, known as Independence day;

(F) The first Monday in September, known as Labor day;

(G) The second Monday in October, known as Columbus day;

(H) The eleventh day of November, known as Veterans' day;

(I) The fourth Thursday in November, known as Thanksgiving day;

(J) The twenty-fifth day of December, known as Christmas day;

(K) Any day appointed and recommended by the governor of this state or the president of the United States as a holiday.

If any day designated in this section as a legal holiday falls on Sunday, the next succeeding day is a legal holiday.

* * *

OHIO REVISED CODE § 102.03

Public official or employee restrictions.

(B) No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

(portions omitted)

* * *

OHIO REVISED CODE § 102.99

Penalties

(A) Whoever violates division (C) of section 102.02 of the Revised Code is guilty of a misdemeanor of the fourth degree.

(B) Whoever violates division (D) of section 102.02, section 102.03, 102.04, or 102.07 of the Revised Code is guilty of a misdemeanor of the first degree.

(C) Whoever violates division (B) of section 102.021 [102.02.1] of the Revised Code shall be fined one thousand dollars.

(D) Whoever violates division (C) of section 102.021 [102.02.1] of the Revised Code shall be fined ten thousand dollars.

* * *

OHIO REVISED CODE § 2151.28

Adjudicatory hearing; shelter care determination; summons.

(A) After the complaint has been filed, the court shall fix a time for an adjudicatory hearing. The court shall conduct the adjudicatory hearing within one of the following periods of time:

(1) If the complaint alleged that the child is a delinquent or unruly child or a juvenile traffic offender, the adjudicatory hearing shall be held and may be continued in accordance with the Juvenile Rules.

(2) If the complaint alleged that the child is an abused, neglected, or dependent child, the adjudicatory hearing shall be held no later than thirty days after the complaint is filed, except that, for good cause shown, the court may continue the adjudicatory hearing for either of the following periods of time:

(a) For ten days beyond the thirty-day deadline to allow any party to obtain counsel;

(b) For a reasonable period of time beyond the thirty-day deadline to obtain service on all parties or any necessary

evaluation, except that the adjudicatory hearing shall not be held later than sixty days after the date on which the complaint was filed.

(B) At an adjudicatory hearing held pursuant to division (A)(2) of this section, the court, in addition to determining whether the child is an abused, neglected, or dependent child, shall determine whether the child should remain or be placed in shelter care until the dispositional hearing. When the court makes the shelter care determination, all of the following apply:

(1) The court shall determine whether there are any relatives of the child who are willing to be temporary custodians of the child. If any relative is willing to be a temporary custodian, the child otherwise would remain or be placed in shelter care, and the appointment is appropriate, the court shall appoint the relative as temporary custodian of the child, unless the court appoints another relative as custodian. If it determines that the appointment of a relative as custodian would not be appropriate, it shall issue a written opinion setting forth the reasons for its determination and give a copy of the opinion to all parties and the guardian ad litem of the child.

The court's consideration of a relative for appointment as a temporary custodian does not make that relative a party to the proceedings.

(2) The court shall make the determination and issue the written finding of facts required by section 2151.419 [2151.41.9] of the Revised Code.

(3) The court shall schedule the date for the dispositional hearing to be held pursuant to section 2151.35 of the Revised Code. The parents of the child have a right to be represented by counsel; however, in no case shall the dispositional hearing be held later than ninety days after the date on which the complaint was filed.

(C) The court shall direct the issuance of a summons

directed to the child except as provided by this section, the parents, guardian, custodian, or other person with whom the child may be and any other persons that appear to the court to be proper or necessary parties to the proceedings, requiring them to appear before the court at the time fixed to answer the allegations of the complaint. The summons shall contain the name and telephone number of the court employee designated by the court pursuant to section 2151.314 [2151.31.4] of the Revised Code to arrange for the prompt appointment of counsel for indigent persons. A child alleged to be an abused, neglected, or dependent child shall not be summoned unless the court so directs. A summons issued for a child who is under fourteen years of age and who is alleged to be a delinquent child, unruly child, or a juvenile traffic offender shall be served on the parent, guardian, or custodian of the child in his behalf.

If the person who has physical custody of the child, or with whom the child resides, is other than the parent or guardian, then the parents and guardian also shall be summoned. A copy of the complaint shall accompany the summons.

(portions omitted)

* * *

OHIO REVISED CODE [§2151.35.2] §2151.352

Right to counsel.

A child, his parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the proceedings and if, as an indigent person, he is unable to employ counsel, to have counsel provided for him pursuant to Chapter 120. of the Revised Code. If a party appears without counsel, the court shall ascertain whether he knows of his right to counsel and of his right to be provided with counsel if he is an indigent person. The court may continue the case to enable a party to obtain counsel or to be represented by the county public defender or the joint county public defender and shall provide

counsel upon request pursuant to Chapter 120. of the Revised Code. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.

Section 2935.14 of the Revised Code applies to any child taken into custody. The parents, custodian, or guardian of such child, and any attorney at law representing them or the child, shall be entitled to visit such child at any reasonable time, be present at any hearing involving the child, and be given reasonable notice of such hearing.

Any report or part thereof concerning such child, which is used in the hearing and is pertinent thereto, shall for good cause shown be made available to any attorney at law representing such child and to any attorney at law representing the parents, custodians, or guardian of such child, upon written request prior to any hearing involving such child.

* * *

OHIO REVISED CODE § 2929.11

Penalties for felony.

(A) Whoever is convicted of or pleads guilty to a felony other than aggravated murder or murder, except as provided in division (D) or (E) of this section, shall be imprisoned for an indefinite term and, in addition, may be fined or required to make restitution, or both. The indefinite term of imprisonment shall consist of a maximum term as provided in this section and a minimum term fixed by the court as provided in this section. The fine and restitution shall be fixed by the court as provided in this section.

Whoever is convicted of or pleads guilty to committing, attempting to commit, or complicity in committing a felony violation of section 2909.02 or 2909.03 of the Revised Code and is sentenced to an indefinite term of imprisonment shall

be required to reimburse agencies for their investigation or prosecution costs in accordance with section 2929.28 of the Revised Code.

(B) Except as provided in division (D) of this section, section 2929.71, and Chapter 2925. of the Revised Code, terms of imprisonment for felony shall be imposed as follows:

. . .

(7) For a felony of the fourth degree, the minimum term shall be eighteen months, two years, thirty months, or three years, and the maximum term shall be five years.

(C) Fines for felony shall be imposed as follows:

. . .

(4) For a felony of the fourth degree, not more than two thousand five hundred dollars.

* * *

OHIO REVISED CODE § 2929.21

Penalties for misdemeanor.

(A) Whoever is convicted of or pleads guilty to a misdemeanor other than a minor misdemeanor shall be imprisoned for a definite term or fined, or both, which term of imprisonment and fine shall be fixed by the court as provided in this section.

Whoever is convicted of or pleads guilty to committing, attempting to commit, or complicity in committing a violation of section 2909.03 of the Revised Code that is a misdemeanor, or a violation fo division (A)(2) of section 2909.06 of the Revised Code when the means used are fire or explosion, shall be required to reimburse agencies for their investigation or prosecution costs in accordance with section 2929.28 of the Revised Code.

(B) Terms of imprisonment for misdemeanor shall be imposed as follows:

(1) For a misdemeanor of the first degree, not more than six months;

(2) For a misdemeanor of the second degree, not more than ninety days;

(3) For a misdemeanor of the third degree, not more than sixty days;

(4) For a misdemeanor of the fourth degree, not more than thirty days.

(C) Fines for misdemeanor shall be imposed as follows:

(1) For a misdemeanor of the first degree, not more than one thousand dollars;

(2) For a misdemeanor of the second degree, not more than seven hundred fifty dollars;

(3) For a misdemeanor of the third degree, not more than five hundred dollars;

(4) For a misdemeanor of the fourth degree, not more than two hundred fifty dollars.

(D) Whoever is convicted of or pleads guilty to a minor misdemeanor shall be fined not more than one hundred dollars.

(E) The Court may require a person who is convicted of or pleads guilty to a misdemeanor to make restitution for all or part of the property damages that is caused by his offense and for all or part of the value of the property that is the subject of any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, that the person committed. If the court determines that the victim of the offense was sixty-five years of age or older or permanently

or totally disabled at the time of the commission of the offense, the court shall, regardless of whether the offender knew the age of victim, consider this fact in favor of imposing restitution, but this fact shall not control the decision of the court.

* * *

OHIO REVISED CODE § 3321.19

Examination of cases of supposed truancy; notice to parent or guardian.

On the request of the superintendent of schools or the board of education or when it otherwise comes to his notice, the attendance officer shall examine into any case of supposed truancy within his district, and warn the child, if found truant, and his parent, guardian, or other person in charge of him, in writing, of the legal consequences of truancy if persisted in. When any child of compulsory school age, in violation of law, is not attending school, the attendance officer shall notify the parent, guardian, or other person in charge of such child of the fact, and require such parent, guardian, or other person to cause the child to attend school forthwith; and the parent, guardian, or other person in charge of the child shall cause such child's attendance at school. Upon the failure of the parent, guardian, or other person in charge of the child to do so, the attendance officer shall make complaint against the parent, guardian, or other person in charge of the child in any court of competent jurisdiction.

* * *

SUPREME COURT OF OHIO
RULES OF PRACTICE

RULE XVI. CERTIFICATION OF QUESTIONS OF STATE LAW FROM FEDERAL COURTS

Section 1. When Certified. The Supreme Court may, at its discretion, answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of

the United States, or a United States District Court. This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which may be determinative of the cause and as to which it appears to the certifying court that there is no controlling precedent in the decisions of this Supreme Court.

Section 2. Method of Invoking Rule. This rule may be invoked upon the issuance of a certification order by any of the courts referred to in Section 1 of this rule.

Section 3. Contents of Certification Order. The certification order shall contain:

(A) The style of the case;

(B) A statement of facts showing the nature of the case, the circumstances out of which the question of law arises, the question of law to be answered, and any other information the certifying court deems relevant to the question of law to be answered;

(C) The names of each of the parties;

(D) The names, addresses, and telephone numbers of counsel for each party; and

(E) A designation of one of the parties as the moving party.

Section 4. Preparation of Certification Order; Notice of Filing. The certification order shall be prepared by the certifying court and signed by any judge or justice presiding over the cause. The clerk of the certifying court shall serve copies of the certification order upon all parties or their counsel of record and file with this court the certification order under seal of the certifying court, along with proof of service.

Section 5. Record. This court may require the original or copies of all or any portion of the record before the certifying

court.

Section 6. Parties. The party designated by the certifying court as the moving party shall be referred to as the petitioner and the party adverse to the petitioner shall be referred to as the respondent.

Section 7. Briefs and Arguments. (A) The brief of the party designated by the certifying court as the moving party shall be filed and served within twenty days of the filing with the Supreme Court of the certification order. The brief of the adverse party shall be filed within twenty days thereafter, and a reply brief may be filed within ten days thereafter.

(B) Oral arguments will not be permitted unless ordered by this court, on its own motion or upon application of a party.

Section 8. Opinion. The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of this court to the certifying court and to the parties or their counsel.

Section 9. Dismissal of Certification. If this court, in the exercise of its discretion, declines to answer any or all of the questions of law certified to it, an entry of the court shall be sent to the certifying court and to all parties or their counsel.

Effective Date: July 15, 1988

* * *

OHIO RULES OF APPELLATE PROCEDURE

RULE 14. COMPUTATION AND EXTENSION OF TIME

(A) Computation of Time. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by an order of court or by any applicable statute, the date of the act, event or default from which the designated

period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

...

Effective Date: July 1, 1971

* * *

OHIO RULES OF CIVIL PROCEDURE

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(A) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

...

Effective Date: July 1, 1970

* * *

OHIO RULES OF JUVENILE PROCEDURE

RULE 4. RIGHT TO COUNSEL; GUARDIAN AD LITEM

(A) Right to Counsel; When Arises. Every party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child.

...

Effective Date: July 1, 1972 [Amended July 1, 1976]

* * *

OHIO RULES OF JUVENILE PROCEDURE

RULE 18. TIME

(A) Time: Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the date of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in computation.

...

Effective Date: July 1, 1972

* * *

OHIO RULES OF JUVENILE PROCEDURE

RULE 22. PLEADINGS AND MOTIONS; DEFENSES AND OBJECTIONS

(A) Pleadings and Motions. Pleadings in juvenile proceedings shall be the complaint and the answer, if any, filed by a party. A party may move to dismiss the complaint or for other appropriate relief.

(B) Amendment of Pleadings. Any pleading may be amended at any time prior to the adjudicatory hearing. After the commencement of the adjudicatory hearing, a pleading may be amended upon agreement of the parties, or if the interests of justice require, upon order of court. Such order shall where requested grant a party reasonable time in which to respond to an amendment.

. . .

Effective Date: July 1; 1972 [Amended July 1, 1977]

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APPELLEE'S

BRIEF

BEST AVAILABLE COPY

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. LAWS THAT REQUIRE PARENTAL NOTIFICATION OF A MINOR'S ABORTION DECISION MUST PROVIDE A PROCEDURE TO BYPASS THE REQUIREMENT FOR MATURE MINORS AND THOSE WHO WOULD BE HARMED BY PARENTAL INVOLVEMENT 3

A. This Court Has Held That Laws Requiring Parental Involvement In A Minor's Abortion Decision Must Provide A Bypass Mechanism 8

B. Parental Notification Laws, Absent A Bypass Mechanism, Create An Overwhelming Burden On The Right To Abortion Unjustified By Any State Interest 12

II. THE OHIO JUDICIAL BYPASS PROCEDURE FAILS TO MEET CONSTITUTIONAL STANDARDS 16

A. The Ohio Statute's Pleading Requirements Are Unconstitutional 16

B. The Clear And Convincing Standard Of Proof Is Unconstitutional 19

C. The Ohio Statute Fails To Guarantee Minors Utilizing The Judicial Bypass A Sufficiently Expedited Procedure 24

PAGE

1. The Three Week Procedure Poses an Overwhelming Burden on the Right to Abortion 24

2. The Constructive Authorization Provision Adds Further Undue Delay to the Judicial Bypass Proceeding 27

D. The Ohio Statute's Bypass Fails To Guarantee Anonymity To The Minor 28

III. THE OHIO STATUTE'S BYPASS PROCEDURE VIOLATES THE MINOR'S RIGHT TO PROCEDURAL DUE PROCESS 31

A. The Ohio Statute Creates A Property Interest Which Entitles A Minor To A Hearing That Comports With Due Process 32

B. The Ohio Judicial Bypass Does Not Comply With Due Process..... 33

1. The Pleading Requirement Deprives Minors of an Opportunity to be Heard. 34

2. Failure to Provide an Expedited Procedure Deprives Minors of a Hearing at a "Meaningful Time" 36

3. Failure to Provide Anonymity Deprives Minors of a Hearing in a "Meaningful Manner" 37

4. The Clear and Convincing Evidence Standard of Proof Violates Procedural Due Process 37

IV. THE PHYSICIAN NOTICE REQUIREMENT SIGNIFICANTLY BURDENS A MINOR'S RIGHT TO ABORTION AND, STANDING ALONE, RENDERS THE ENTIRE STATUTE UNCONSTITUTIONAL..... 39

PAGE

A. The Physician Notice Requirement Significantly Burdens A Minor's Right To Abortion 39

B. The Invalidity Of The Physician Notice Provision, Standing Alone, Renders The Entire Statute Invalid..... 41

CONCLUSION 42

TABLE OF AUTHORITIES

Cases: PAGE

Addington v. Texas, 441 U.S. 418 (1979).....19, 21, 38

Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988) .....*passim*

Akron Center for Reproductive Health v. Rosen, 633 F. Supp. 1123 (N.D. Ohio 1986).....*passim*

American College of Obstetricians and Gynecologists v. Thornburgh, 656 F. Supp. 879 (E.D. Pa. 1987)..... 24

Armstrong v. Manzo, 380 U.S. 545 (1965)..... 36

Arnett v. Kennedy, 416 U.S. 134 (1974) 33

Barry v. Barchi, 443 U.S. 55 (1979)..... 32

Barnes v. Mississippi, No. J86-0458(W) (S.D. Miss. July 2, 1986) 27

Bellotti v. Baird, 428 U.S. 132 (1976) 18, 26

Bellotti v. Baird, 443 U.S. 622 (1979).....*passim*

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 24

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).....32, 33, 34, 35

City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).....10, 11, 12, 13, 15, 26, 39, 40

Colautti v. Franklin, 439 U.S. 379 (1979)..... 28

Doe v. Irwin, 615 F.2d 1162 (6th Cir. 1980)..... 22

Evitts v. Lucey, 469 U.S. 387 (1985) 33, 34

Frisby v. Schultz, 108 S. Ct. 2495 (1988) 24, 26

PAGE

Glick v. McKay, 616 F. Supp. 322 (D. Nev. 1985)..11, 24, 27

Goldberg v. Kelly, 397 U.S. 254 (1970).....32, 36

Goss v. Lopez, 419 U.S. 565 (1975).....14, 31, 32

H.L. v. Matheson, 450 U.S. 398 (1981) 9, 10, 11, 15, 20

Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986), *rev'd*, 853 F.2d 1452 (8th Cir. 1988) 5, 11, 13, 14, 23

Indiana Planned Parenthood Affiliates Association v. Pearson, 716 F.2d 1127 (7th Cir. 1983) 11, 12-13

In re Gault, 387 U.S. 1 (1967)..... 14

In re Winship, 397 U.S. 358 (1970) 20

Lacey v. Laird, 166 Ohio St. 12, 139 N.E. 2d 25 (1956) 22

Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982).....31, 32, 33, 34, 35, 36

Mathews v. Eldridge, 424 U.S. 319 (1976) 2, 34, 35, 36, 37, 38, 39

National Mutual Insurance Company v. Tidewater Transfer Company, 337 U.S. 582 (1949)..... 32

Olim v. Wakinekona, 461 U.S. 238 (1983) 32

Orr v. Knowles, No. CV81-0-301 (D. Neb. Sept. 16, 1983)..... 11

Parham v. J.R., 442 U.S. 584 (1979)..... 14

Planned Parenthood Association of the Atlanta Area v. Harris, 691 F. Supp. 1419 (N.D. Ga. 1988) 27

Planned Parenthood Association of the Atlanta Area v. Harris, 670 F. Supp. 971 (N.D. Ga. 1987) 11

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).....15, 20

PAGE

Planned Parenthood Association of Nashville v. McWherter, 716 F. Supp. 1064 (M.D. Tenn. 1989)... 26

Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006 (1st Cir. 1981)..... 30

Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476 (1983) 24, 26, 30

Prince v. Massachusetts, 321 U.S. 158 (1944) 22

Roe v. Corbin, Civ. 85-2118 PHX CLH (D. Ariz. Sept. 23, 1985) 11

Roe v. Wade, 410 U.S. 113 (1973).....4, 15, 20

Santosky v. Kramer, 455 U.S. 745 (1982)...19, 20, 21, 37, 38

Thomas v. Arn, 474 U.S. 140 (1985)..... 34

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 30

Vasquez v. Hillery, 474 U.S. 254 (1986) 12

Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) 41

Wisconsin v. Yoder, 406 U.S. 205 (1972) 7

Women's Community Health Center v. Cohen, 477 F. Supp. 542 (D. Me. 1979) 11

Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir. 1985), *aff'd mem.*, 108 S. Ct. 479 (1987) 11

Constitution, Statutes, Rules and Attorneys General Opinions:

U.S. Constitution, Fourteenth Amendment.....*passim*

Ohio Juvenile Code 7

Ohio Rev. Code Ann.
§ 2151.85(A) 13, 29

PAGE

§ 2151.85(B) 27, 29
§ 2151.85(C).....17, 18, 19
§ 2505.073(A) 27
§ 2919.12(B) 13
§ 3709.24.1 5
§ 3719.012(A) 5

Ohio Rule of Juvenile Procedure 22(B).....18, 35

Ohio R. App. P. 14(A)..... 24

Ohio Supreme Court Rule XVI.....19, 26

Maryland Op. Att'y Gen. No. 85-035 (Dec. 31, 1985) .. 11

Tennessee Op. Att'y Gen. No. 84-239 (August 7, 1984). 11

Books, Articles and Other Publications:

Atkinson, *The Next Contraceptive Revolution*, 18 Fam. Plan. Persp. 19 (1986)..... 3

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PAGE

Torres *et al.*, *Telling Parents: Clinic Practices and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284 (1980) 6, 14, 23

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-805

STATE OF OHIO,

Appellant,

—vs.—

AKRON CENTER FOR REPRODUCTIVE HEALTH, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR APPELLEES

SUMMARY OF ARGUMENT

The Constitution demands that states which compel parental involvement in minors' abortion decisions provide a procedure by which mature minors or those who would be harmed by parental involvement can obtain a waiver of the requirement. Contrary to the State's assertions, this Court has already ruled that such a procedure is required in connection with parental notification laws. Those prior rulings are sound legally and factually and should not be disturbed. Across-the-board parental notification laws would create overwhelming burdens on the right to abortion of mature minors or those for whom parental involvement threatens harm, rather than promises comfort. These burdens are unjustified by any legitimate state interest and this Court must reject the State's invitation to abandon settled and sound legal principles.

Under standards set by this Court in *Bellotti v. Baird*, 443 U.S. 622 (1979), the Ohio judicial bypass is unconstitutional. It allows a minor's petition to be dismissed because of technical pleading errors, thereby violating this Court's mandate that she be given an opportunity to show that she is mature or that involving her parents is contrary to her best interests. It requires the minor to demonstrate her entitlement to a waiver of parental notification under a clear and convincing standard of proof. This standard allocates the risk of error against her, directly and significantly burdening her fundamental right to abortion. The State has shown no adequate justification for this burden. The bypass envisioned by the statute could take at least three weeks, thereby unjustifiably increasing the health risks and costs for minor petitioners and depriving them of an opportunity to obtain an abortion. Moreover, in violation of this Court's prior holdings, the minor's anonymity is breached by requiring her to disclose her name, and that of her parents on her petition to the court, a requirement the State has made no attempt to justify.

Even if this Court were to hold that the Constitution does not compel the states to make exceptions for mature or best interests minors, Ohio has done so. By so doing, it has created for those minors a property interest in a confidential abortion. Due process requires that they be accorded a fundamentally fair procedure to determine their entitlement to an exemption from parental notification. Ohio's judicial bypass is not such a procedure. None of the four features of the bypass which the Court of Appeals found invalid satisfy the three-pronged due process test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). The pleading rules deny the minor an opportunity to be heard and a fair chance for adjudication on the merits. The time frame of the bypass and the breach of anonymity deny the minor a hearing at a meaningful time and in a meaningful manner. The clear and convincing evidence standard places the risk of error on the minor in defending a crucial right, heightens the risk of an erroneous outcome and does not advance any legitimate state interest.

The requirement that the physician personally notify a parent adds to the cost of an abortion for no legitimate reason. In addition, since this unconstitutional requirement is not severable from the balance of the statute, it alone is a basis upon which to affirm the lower court's judgment.

ARGUMENT

I. LAWS THAT REQUIRE PARENTAL NOTIFICATION OF A MINOR'S ABORTION DECISION MUST PROVIDE A PROCEDURE TO BYPASS THE REQUIREMENT FOR MATURE MINORS AND THOSE WHO WOULD BE HARMED BY PARENTAL INVOLVEMENT

Our country's teenage pregnancy rate is among the highest in the developed world.[1] Its consequences are devastating.[2] Teenage women who carry their pregnancies to term[3] face constricted life opportunities. They are far less likely to finish school than their peers who postpone childbearing;[4] they are far more likely to have low-paying jobs, live the balance of their lives in poverty,[5] and enter an early and unstable marriage.[6] Carrying a pregnancy to term puts their health and that of their fetus at risk[7] and children of teenage mothers face renewed cycles of poverty.[8]

---

1 Jones, *et al.*, *Teenage Pregnancy in Developed Countries: Determinants and Policy Implications*, 17 Fam. Plan. Persp. 53 (1985).

2 Eighty percent of teenage pregnancies are unintended, as compared to half of all pregnancies in the general population. Atkinson, *The Next Contraceptive Revolution*, 18 Fam. Plan. Persp. 19 (1986).

3 Forty percent of pregnancies of 15-19 year olds end in induced abortion. National Research Council, *Risking The Future: Adolescent Sexuality, Pregnancy, and Childbearing* 58 (1987).

4 *Id.* at 126.

5 *Id.* at 130-34.

6 *Id.* at 128.

7 *Id.* at 123-25.

8 *Id.* at 134-38.

All these consequences have been recognized by this Court which has repeatedly ruled that the Constitution accords minors stringent protection of their right to avoid unwanted pregnancy:

> [T]he potentially severe detriment facing a pregnant woman, see *Roe v. Wade*, 410 U.S. at 153, . . . is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility . . . . In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.

Bellotti v. Baird, 443 U.S. 622, 642 (1979) (*Bellotti II*).

In *Bellotti II*, this Court[9] sought to reconcile the fundamental nature of the minor's abortion right with a state's legitimate interest in ensuring that minors make a mature decision regarding abortion. The Court found that the state's traditional method of effectuating its interest—requiring that parents be involved in a minor's decision—carried the potential for unjustifiable and unnecessary burdens on that minor's right to abortion. This Court explicitly held that compelled parental involvement, whether in the form of consent or notification, could result in efforts by parents to block the minor's access to abortion services. The Court took particular notice of the efficacy of parental pressure and the vulnerability of dependent teenagers living at home to that pressure. *Id.* at 647. Finally, the Court acknowledged that in many cases parental opposition does not promote the child's best interest. It may be based solely on the parents' ideological opposition to abortion, for example. *Id.* The Court also acknowledged that as to mature minors, the state's interest in special protection is absent. *Id.*

This Court therefore reconciled the minor's right to choose an abortion with the state's interest in protection by holding

9 The decision was for a plurality which became a majority in subsequent cases. *See infra* Point I.A. at 10.

that where the state legislates to promote parental involvement, it must provide a procedure[10] that permits mature minors or those who would be harmed by parental involvement to obtain a waiver of the notice requirement. The reason why this sensitive reconciliation was necessary for abortion, while it may not have been in other areas of teenage behavior, is the unique nature of the abortion decision. Unlike the exercise of other rights, such as marriage, which a minor can postpone until majority, the right to abortion expires in a matter of weeks from the onset of pregnancy, with grave and indelible consequences. *Id.* at 642.[11]

The *Bellotti* reconciliation is entirely consistent with public health practices generally. It is universally recognized that there are certain sensitive areas of health care where confidentiality is critical for teenagers. For example, every state, including Ohio, has a statute allowing minors to consent to treatment for sexually transmitted diseases.[12] Similarly, more than half the states allow minors to consent for pregnancy care and treatment of drug-related problems.[13] These laws reflect an understanding

10 The procedure need not be judicial. The state might "delegate the alternative procedure to . . . an administrative agency or officer." *Bellotti*, 443 U.S. at 643 n.22. In view of the considerable burdens of the judicial bypass, *see Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986), *rev'd on other grounds*, 853 F.2d 1452 (8th Cir. 1988), "much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction." *Bellotti*, 443 U.S. at 643 n.22.

11 This holding of *Bellotti* effectively answers *amicus* Knights of Columbus' argument that abortion is indistinguishable from other rights subject to parental control, such as marriage, travel, and forming a contract. *See* Brief of The Knights of Columbus as *Amicus Curiae* in Support of Appellant in No. 88-805, and Respondents-Cross-Petitioners in Nos. 88-1125 and 88-1309, at 5-11, 18.

12 *See* Brief for Petitioners, *Hodgson v. Minnesota*, *Minnesota v. Hodgson*, Nos. 88-1125 and 88-1309, at A-8; Ohio Rev. Code Ann. § 3709.24.1 (Baldwin 1980).

13 *Hodgson* brief, *supra* note 12, at A-11-A-18; Ohio Rev. Code Ann. § 3719.012(A) (Baldwin 1989) (allowing minors to consent to treatment for drug or alcohol abuse).

that absent confidentiality teens simply will not seek crucial health care in these sensitive areas. Studies confirm that where confidentiality cannot be assured, fear of parental reactions is a deterrent to teenagers obtaining abortion, contraception and prenatal services.[14] It is clear, moreover, that parental involvement requirements cause minors to delay seeking services,[15] leading to increased health risks,[16] and to flee the state in order to find confidential services elsewhere.[17] This desperate need for privacy is not ephemeral or imagined. National data on

14 About one-fourth of teenage abortion patients in one survey said they would not seek an abortion if their parents had to be notified. Nine percent said they would seek an illegal or self-induced abortion. Torres *et al.*, *Telling Parents: Clinic Practices and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 287-88, 291 (1980). Confidentiality is the principal reason teens gave for choosing a family planning clinic in another study, Zabin and Clark, *Institutional Factors Affecting Teenagers' Choice and Reasons for Delay in Attending a Family Planning Clinic*, 15 Fam. Plan. Persp. 25, 26 (1983), and fear of parents finding out about clinic attendance is one of the chief reasons for delay. Zabin and Clark, *Why They Delay: A Study of Teenage Family Planning Clinic Patients*, 13 Fam. Plan. Persp. 205, 213 (1981). The desire to keep pregnancy secret leads many teens to seek late prenatal care. Institute of Medicine, *Prenatal Care: Reaching Mothers, Reaching Infants* 78 (Brown ed. 1988). In one study, about one-third of pregnant teenagers who did not tell their parents about a planned abortion cited fear of parental abuse, other retaliatory actions, or being prevented from obtaining abortions. Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 Am. J. Pub. Health 283, 284 (1982).

15 The proportion of minors receiving second trimester abortions increased dramatically during the years Minnesota's parental notification law was in effect. *Hodgson v. Minnesota*, No. 88-1125, Appendix to Petition for Writ of Certiorari at 135a. *See also* Zabin and Clark, *Institutional Factors*, *supra* note 14.

16 *See infra* p. 24.

17 Cartoof and Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 16 Am. J. Pub. Health 397 (1986) (The main effect of Massachusetts' parental consent law is that one-third of teenage abortion patients obtain abortions in neighboring states).

child abuse confirm that minors' fears regarding parental reactions are well founded.[18]

This Court's recognition of the maturity of older adolescents is equally sound. As Justice Douglas observed, "there is substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the 14-year-old approaches that of the adult." *Wisconsin v. Yoder*, 406 U.S. 205, 245 n.3 (1972) (Douglas, J., dissenting). Professional studies establish that adolescents exhibit adult capacity in making the decision whether to continue or terminate a pregnancy.[19] The experience of state courts with jurisdiction over minors' petitions to waive parental involvement confirms this. Thousands have been found mature enough to consent to abortion without parental involvement.[20]

Nevertheless, the State asks this Court to disregard these realities, to ignore the very real fears and needs of these young women and to dismantle *Bellotti's* sensitive reconciliation of state interests and individual liberties, holding instead that parental notification laws need make no exception for the mature or "best interests" minor. The State argues that the judicial bypass fashioned by the Ohio legislature to allow such minors to obtain a waiver of the parental notification require-

18 In 1986, more than one million children and adolescents suffered harm from parental abuse or neglect, including sexual abuse. Pregnancy does not deter and may even precipitate physical attacks on women. Brief for *Amici Curiae* American Psychological Association, National Association of Social Workers, Inc., and The American Jewish Committee in Support of Petitioners/Cross-Respondents in Nos. 88-1125, 88-1309 and in Support of Appellees in No. 88-805, at 9-10 and sources cited therein. In fact, Ohio's Juvenile Code is almost exclusively concerned with parents who abuse, neglect or abandon their minor children.

19 American Psychological Association brief, *supra* note 18, at 18-29 and sources cited therein.

20 *See, e.g.*, *Hodgson v. Minnesota*, *Minnesota v. Hodgson*, Nos. 88-1125 and 88-1309, Joint Appendix at J.A. 163, J.A. 284. *See infra* note 41.

ment is merely gratuitous, not constitutionally required and, therefore, immune from judicial scrutiny.[21] State's Brief at 28.

The State's argument rests on two incorrect premises: first, that the holding in *Bellotti II* and subsequent cases was limited to laws requiring parental consent; and second, that the burden created by a requirement of parental notification is substantially less than that created by a requirement of consent and, therefore, does not merit strict judicial scrutiny. This Court should reject the State's contentions and reaffirm that a parental involvement statute is unconstitutional as applied to either mature minors or to minors for whom such involvement would be contrary to their best interests.

A. This Court Has Held That Laws Requiring Parental Involvement In A Minor's Abortion Decision Must Provide a Bypass Mechanism

The State contends that this Court's rulings on the necessity for a judicial bypass mechanism are limited to laws which give parents a legal veto power over their daughter's abortion. State's Brief at 25. On the contrary, a majority of the Court has ruled explicitly that it is compelled parental involvement—whether in the form of parental consent or notification—that necessitates a bypass mechanism for mature or best interests minors.

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21 As explained in Point III, *infra* pp. 30-38, a finding that the bypass is not constitutionally required would not, as the State asserts, end this Court's inquiry. State's Brief at 28. By creating an interest in a confidential abortion for mature and best interests minors, the State has bound itself to follow due process in the judicial bypass procedure. It is noteworthy that 61 sponsors of the Ohio statute have filed an *amicus curiae* brief in support of this appeal but have omitted support for the State's contention that the Constitution requires no judicial bypass. *See* Brief of Jerome S. Luebbers, for Himself and 61 Other Members of the Ohio General Assembly as *Amicus Curiae* in Support of Appellant, State of Ohio.

In *Bellotti II*, a plurality of this Court[22] held a parental consent law containing a judicial bypass unconstitutional because it failed to provide a mechanism for minors completely to avoid hostile parental involvement. That law required the minor to seek her parents' consent (and be refused) before approaching the court for a waiver and further required that she notify her parents when she had commenced court proceedings. The plurality held that such a notification requirement placed an "undue burden" on a minor's right to abortion:

> [P]arents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.

Id. at 647. The plurality therefore held that a minor has a right to complete confidentiality and cannot be compelled to involve a parent unless an independent decisionmaker determines that she is not mature enough to make the decision independently and that it would be in her best interests for her parents to be involved in her decision. *Id.* at 648.[23]

In *H.L. v. Matheson*, 450 U.S. 398 (1981), this Court sustained a Utah law which required parental notification without a judicial bypass, expressly noting that its decision applied only to immature dependent minors who made no claim as to their

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22 The plurality included Justices Powell, Stewart, and Rehnquist, and Chief Justice Burger.

23 Four Justices concurred in the judgment on the basis that the Massachusetts statute gave judges an arbitrary veto power over the minor's abortion. *Bellotti II*, 443 U.S. at 653-54 (Stevens, Brennan, Marshall and Blackmun, JJ., concurring).

relations with their parents. *Id.* at 407.[24] A majority of this Court, however, composed of two Justices concurring in the judgment and three dissenting, made clear that the Utah law would be unconstitutional as to mature or best interests minors. *Id.* at 420 and n.9 (Stewart and Powell, JJ., concurring), and 437-39 (Marshall, Brennan, and Blackmun, JJ., dissenting). As Justice Powell said:

> [A] State may not validly require notice to parents in all cases, without providing an independent decisionmaker to whom a pregnant minor can have recourse if she believes she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best interests.

Id. at 420.

Two years later, in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (*Akron I*), this view commanded a six-member majority.[25] This Court ruled that a municipal parental consent ordinance was unconstitutional because neither it, nor any Ohio statute, made:

> provision for a mature or emancipated minor completely to avoid hostile *parental involvement* by demonstrating to the satisfaction of the court that she is capable of exercising her constitutional right to choose an abortion. On the contrary, the statute requires that the minor's parents be notified once a petition has been filed, . . . a requirement that in the case of a mature minor seeking an abortion

24 *Matheson* is inapposite for yet another reason. In that case the Utah law allowed the physician to notify a parent immediately before the abortion, thereby lessening the possibility of parental obstruction of the minor's choice. In contrast, under the Ohio statute, a twenty-four hour waiting period between notification and performance of the abortion allows time for parents to block the abortion. It was apparent at oral argument in *Matheson* that this Court was concerned with that distinction. Transcript of Oral Argument, *H.L. v. Matheson*, No. 79-5903 at 48.

25 Justices Powell, Stevens, Blackmun, Marshall, and Brennan and Chief Justice Burger joined the majority opinion.

> would be unconstitutional. *See H. L. v. Matheson*, 450 U.S. at 420 (Powell, J., concurring); *id.* at 428 n.3 (Marshall, J., dissenting).

Akron I, 462 U.S. at 441 n.31 (emphasis added).[26] *See also id.* at 427 n.10 ("[A majority of this Court has indicated] state and parental interests must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement.")

Within three months of *Akron I*, the Court of Appeals for the Seventh Circuit said that case had "settled" the issue of whether states must provide bypass procedures for parental notification laws as well as for consent. *Indiana Planned Parenthood Affiliates Association v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983). Since then, the federal courts faced with the issue have agreed unanimously with that conclusion. *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852, 861 (6th Cir. 1988); Jurisdictional Statement Appendix (J.S.A.) at A-17; *Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985), *aff'd mem.*, 108 S. Ct. 479 (1987); *Hodgson v. Minnesota*, 853 F.2d 1452, 1456 (8th Cir. 1988); *Glick v. McKay*, 616 F. Supp. 322, 325 (D. Nev. 1985), *appeal pending*; *Planned Parenthood Association of the Atlanta Area v. Harris*, 670 F. Supp. 971, 985 (N.D. Ga. 1987); *Roe v. Corbin*, Civ. 85-2118 PHX CLH (D. Ariz. Sept. 23, 1985) (order granting preliminary injunction); *Orr v. Knowles*, No. CV81-0-301 (D. Neb. Sept. 16, 1983).[27]

Contrary to its assertions, therefore, the State asks this Court to reconsider settled legal principles and to ignore the doctrine

26 The Court made this ruling in the context of holding that abstention was unwarranted because the parental notification requirement was so clearly unconstitutional. *Akron I*, 462 U.S. at 441 n.31.

27 *See also Women's Community Health Center v. Cohen*, 477 F. Supp. 542, 547 (D. Me. 1979) (pre-*Akron I* determination that parental notification laws must have a bypass); Maryland Op. Att'y Gen. No. 85-035 (Dec. 31, 1985); Tennessee Op. Att'y Gen. No. 84-239 (August 7, 1984) (parental notification laws unenforceable without bypass mechanism).

of *stare decisis*. However, no overarching considerations exist that would justify departing from *stare decisis* in this case. *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). To the contrary, the rationale for requiring a bypass for parental notification as well as for consent was valid when made and remains valid today. This Court, therefore, should continue to adhere to the principles enunciated in *Bellotti II* and subsequent cases.

B. Parental Notification Laws, Absent A Bypass Mechanism, Create An Overwhelming Burden On The Right To Abortion Unjustified By Any State Interest

Ignoring these precedents, the State urges this Court to make a distinction it has never made before between laws that require parental consent and laws that require notification. A consent statute, the State says, creates an intolerable burden on the right to abortion because it allows a parent to "divest a minor of her right to choose." State's Brief at 25. In contrast, according to the State, laws that require notification merely allow parents to "oppose" their daughter's decision, creating at most some "mental or emotional discomfort." *Id.* at 25. The State's position is specious and cavalierly ignores the realities of parental abuse of minors, both physical and emotional. It is a distinction without a difference, both legally and factually.

The *Bellotti II* Court explicitly recognized that parental involvement could lead to more than "discomfort" for the minor. It invalidated the Massachusetts statute precisely because efforts by parents to oppose and block the abortion or access to court could lead to a *de facto* veto. *Accord Akron I*, 462 U.S. at 427 n.10. The Seventh Circuit cogently observed that, for dependent minors, there is no practical difference between notification and consent.

> [A]s a practical matter, a notification requirement will have the same deterrent effect on a minor seeking an abortion as a consent statute has. . . .
>
> [P]arents have considerable leeway to impose punishment upon their children for disobedience. Because of this, minors often have no choice but to comply with parental directives.
>
> Although notification requirements do not give parents the legal power to veto their daughter's abortion decision, as a practical matter they may.

Pearson, 716 F.2d at 1132 (citing *Bellotti II*, 443 U.S. at 647). *See also* J.S.A. at A-74 (noting the "practical equivalency" for dependent minor women of consent and notification statutes).

Nevertheless, the State characterizes as "without foundation" the lower court's assumption that some parents will react with hostility and will block their daughter's abortion decision. State's Brief at 26. The Ohio statute itself rebuts this.[28] It recognizes the reality that teenagers' fear of their parents' reactions to the news of their sexual activity and/or planned abortion may be well-founded. It creates a specific provision for waiver of parental notification upon a showing that a parent has "engaged in a pattern of physical, sexual or emotional abuse. . . ."[29] Ohio Rev. Code Ann. § 2151.85(A)(b); J.S.A. at A-38. Whatever arguments the Ohio Attorney General advances, the Ohio legislature in drafting the statute clearly recognized parental notification could cause minors more than mere "emotional discomfort."[30]

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28 Data on child abuse also rebut this. *See supra* note 18, Brief for *Amicus Curiae* American Psychological Association, and sources cited therein.

29 This provision appears in two places. A relative may execute an affidavit alleging abuse which allows the physician to waive notice *and* the bypass. Ohio Rev. Code Ann. § 2919.12(B)(1)(b)(iii); J.S.A. at A-48; and the juvenile court may waive notification on a finding of abuse. Ohio Rev. Code Ann. § 2151.85(A)(b); J.S.A. at A-38. The Ohio legislature apparently wanted to be sure these forms of abuse would be included under the "best interests" rubric.

30 The record in *Hodgson v. Minnesota*, a case pending before this Court, is replete with evidence establishing that without a bypass procedure, parental notification laws would overwhelmingly burden a minor's right to abortion. *See* Brief of Cross-Respondents, *Hodgson v. Minnesota*, *Minnesota v. Hodgson*, Nos. 88-1125 and 88-1309. That record, however, was made in the context of a challenge to a parental

The necessity for procedural safeguards for minors is not a novel issue for this Court. Other holdings of this Court recognize the reality that parents and others who purport to act in a minor's best interests do not always do so. In *Parham v. J.R.*, 442 U.S. 584 (1979), this Court held that minors involuntarily committed to mental institutions by their parents are entitled, at least, to review by medical personnel exercising independent judgment. *See also Goss v. Lopez*, 419 U.S. 565 (1975) (juveniles entitled to a hearing before suspension from school); *In re Gault*, 387 U.S. 1, 17-21 (1967) (despite the "highest motives and most enlightened impulses" on the part of those administering juvenile justice, the Constitution requires due process for juveniles).

There is no real doubt about the result if parental notification were compelled without a bypass mechanism. Many minors[31] would suffer the consequences of parental abuse and/or obstruction of their choice. Others would delay dealing with the issue until they can no longer hide their pregnancies, creating *de facto* notification at a point in their pregnancies when abortion has become many times more medically dangerous or impossible to obtain.[32] Many more will seek a way to avoid the requirement altogether by fleeing the state, seeking an illegal or self-induced procedure, or carrying to term in circumstances where such a decision is manifestly against their best interests.[33]

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notification law with a bypass in effect, and because the *Hodgson* district court, like the lower courts in this case and all others which have considered the issue, *see supra*, p. 11, viewed the need for a bypass as one of settled constitutional law, it did not make specific findings of fact on that issue. If this Court, despite the *Hodgson* record and the established legal and factual principles discussed here, entertains any doubts as to the burden of parental notification absent a bypass, a remand is appropriate in this case for the development of a record on that issue.

31 The majority of all minors tell their parents voluntarily. The overwhelming majority of those under 16 years of age do so. *Telling Parents*, *supra* note 14, at 287.

32 *See supra* pp. 5-7, and sources cited therein, and *infra* p. 24.

33 *See supra* pp. 5-7, and sources cited therein.

The burdens imposed on abortion rights by forced parental notification legislation[34] require that such legislation be strictly scrutinized to determine if it is narrowly tailored to serve a significant state interest not present for adults. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976); *Roe v. Wade*, 410 U.S. at 155; *H.L. v. Matheson*, 450 U.S. at 413. Across-the-board parental notification laws cannot meet this test. It is inconceivable that any legitimate state interest is served by requiring minors to notify abusive parents or parents whose involvement will otherwise be contrary to their best interests. Moreover, since mature minors, by definition, have the capacity to make the abortion decision independently, requiring them to notify their parents is not necessary to serve any state interest—whether in protecting them from their own immaturity or supporting the parental role in child rearing.

Absent a judicial bypass procedure, parental notification laws would create an overwhelming burden on a minor's right to abortion unjustified by any legitimate state interest. This Court must reject the State's contention that the bypass is not constitutionally required and reaffirm its prior holdings that protect mature minors and those with reason to fear the consequences of forced notification.

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34 This Court appears to be divided about what degree of burden on the right to abortion gives rise to a requirement that legislation be "strictly scrutinized." While some would hold that any "significant" intrusion on abortion rights warrants such scrutiny, *Akron I*, 462 U.S. at 430, others would hold that only an "unduly burdensome" law does so. *Id.* at 461 (O'Connor, J., dissenting). Regardless of the test used, however, parental notification, absent a judicial bypass, creates a burden which mandates strict scrutiny. In fact, Justice O'Connor cited the "effective parental veto" which concerned the plurality in *Bellotti II* as an example of an "undue burden." *Akron I*, 462 U.S. at 464. That effective veto, of course, included the possibility of a *de facto* veto via parental notification.

II. THE OHIO JUDICIAL BYPASS PROCEDURE FAILS TO MEET CONSTITUTIONAL STANDARDS

Recognizing the fundamental nature of a minor's abortion right, this Court has ruled that states must legislate with "particular sensitivity" when they seek to foster parental involvement: the minor must have ready access to a procedure to establish that she is mature or that involving her parents would be against her best interests. *Bellotti II*, 443 U.S. at 643-44. The bypass proceedings must be anonymous and expeditious enough to give the minor an effective opportunity to obtain an abortion without involving her parents. *Id.*

The Ohio statute's bypass mechanism ignores these requirements. Rather than being "sensitive" legislation designed to preserve a minor's ability to exercise this crucial right, it erects daunting barriers for which no legitimate state interest exists or is even asserted. The statute includes a pleading requirement which denies the minor the opportunity to prove her maturity or best interests; a requirement that she meet an extraordinary standard of proof to demonstrate her entitlement to an abortion without parental notification; a time frame for decision on her petition that unduly delays effectuation of her abortion choice; and a requirement that she breach her anonymity in order to obtain a waiver of parental notification.

A. The Ohio Statute's Pleading Requirements Are Unconstitutional

This Court has created a specific and clear framework for the evaluation of a minor's petition to bypass compelled parental involvement:

> If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, *she must be permitted to show* that an abortion . . . would be in her best interests.

Bellotti II, 443 U.S. at 647-48 (emphasis added).

The Ohio statute violates these standards. It provides that if the minor only alleges "maturity" in her complaint, the court may consider only that issue and must dismiss the complaint if it finds her immature. Ohio Rev. Code Ann. § 2151.85(C)(1); J.S.A. at A-40. Similarly, if the minor alleges that notification is not in her best interests, the Court may consider only that issue and must dismiss the complaint if it finds against her. *Id.* at § 2151.85(C)(2); J.S.A. at A-40. Only if the minor alleges *both* that she is mature *and* that parental notification would be against her best interests may the court proceed with the two-tiered adjudication mandated in *Bellotti II*: an initial determination of maturity and if maturity is not found, a secondary determination of "best interests." *Id.* at § 2151.85(C)(3); J.S.A. at A-40-41.

This statutory scheme is implemented by forms prescribed by the Ohio Supreme Court. The minor must select from among three forms: one which alleges maturity only (Form A); one which alleges best interests only (Form B); and one which includes both allegations (Form C). Joint Appendix (J.A.) at JA-3-11. Thus, as mandated by the statute, a minor who chooses the "maturity" form (A) loses the right, enunciated in *Bellotti II*, to show that parental involvement is against her best interests and a minor who chooses the "best interests" (Form B) loses the right, also enunciated in *Bellotti II*, to demonstrate that she is mature enough to proceed without parental involvement. Only if the minor selects Form C will she receive a constitutionally correct procedure.

The State argues that the right in *Bellotti II* is limited to the scope of the claims a minor raises in her pleadings; for otherwise the court hearing her case will be forced to undertake a "fishing expedition." State's Brief at 40. *Bellotti II* plainly contravenes this contention. A minor who fails to convince the court she is mature "*must be permitted to show* that an abortion nevertheless would be in her best interests." 443 U.S. at 647-48 (emphasis added). *Bellotti II* directs a court hearing the minor's petition to receive evidence and make a finding on the minor's best interests if it finds her to be immature. There is no

intimation that the court's obligation is limited (or may be limited) to the allegations of the minor's complaint.

The requirement is not frivolous, for this Court has recognized that the goal of the hearing is to assist, not to entrap, a young woman in crisis. The requirement that the Court assure itself that forced notification is necessary, appropriate and not dangerous can hardly be called a "fishing expedition." Without *both* exemptions—maturity and best interests—parental involvement legislation would be "unduly burdensome" and not narrowly tailored to meet the state interests in protecting immature minors. *Bellotti II*, 443 U.S. at 647.

The State, nevertheless, argues that by requiring the appointment of counsel, someone other than the juvenile court is available "to discern what, if any, claims the minor has." State's Brief at 39. This just compounds the problem. *Bellotti II* established that the minor is entitled to have the juvenile court consider both issues regardless of what she *or* her lawyer alleges in the pleadings. Consequently, if the lawyer files Form A because he or she concludes that the minor is mature but that parental involvement is not against her best interests, a court finding the minor to be immature is nevertheless obligated to give her an opportunity to demonstrate that forced notice is not in her best interests. The statute is unconstitutional because it prevents the juvenile court from doing so.

Finally, the State argues that under Ohio's pleading rules, the juvenile court could allow amendment of the pleadings even as late as the hearing. State's Brief at 40 and n.17. The applicable rules, however, allow such amendments only when "the interests of justice require," Ohio Rule of Juvenile Procedure 22(B),[35] thus leaving the amendment to the discretion of the juvenile court judge.[36]

35 This would not be a motion to conform the pleadings to the proof because the proof which the juvenile court may take at the hearing is limited to the matters alleged in the complaint. Ohio Rev. Code Ann.

(*Footnote 36 appears on next page*)

Thus the statute would provide for a constitutional procedure only at the discretion of individual juvenile court judges. This violates the basic premise of *Bellotti II*. In that case the Court struck the Massachusetts law because it allowed a juvenile court discretion to substitute its view of a minor's best interests for a mature minor's own decision. 443 U.S. at 650. The State's proposed construction of the Ohio statute would do just that by allowing a mature minor to show her entitlement to an abortion only at the discretion of the juvenile court judge.

The Court of Appeals' judgment must be affirmed.

B. The Clear And Convincing Standard Of Proof Is Unconstitutional

The Ohio statute requires a minor to prove her entitlement to a waiver of parental notification by "clear and convincing evidence." Ohio Rev. Code Ann. § 2151.85(C); J.S.A. at A-40-41. The function of a standard of proof is to allocate the risk of error between the litigants. *Santosky v. Kramer*, 455 U.S. 745, 755 (1982). A standard of clear and convincing evidence allocates the risk of error against the party with the burden of proof. J.S.A. at A-23.

This Court has held that when the state seeks to deprive an individual of liberty interests which are "particularly important and more substantial than mere . . . money," it must take upon itself the risk of error. *Id.* at 756 (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979)). The Ohio statute turns this principle on its head. It imposes the risk of an erroneous outcome on the young woman, "the precise individual whose fun-

§ 2151.85(C)(1)-(3); J.S.A. at 40-41. Since the court may not make findings on a minor's maturity if she alleges best interests only, and vice versa, there will be no evidence to suggest that the pleadings should be amended to conform to the proof.

36 Insofar as the language of this rule could be interpreted to require a procedure that conforms to *Bellotti II*, this Court should abstain from ruling and certify questions on the meaning of the statute to the Ohio Supreme Court pursuant to Ohio Supreme Court Rule XVI. *See Bellotti v. Baird*, 428 U.S. 132 (1976) (*Bellotti I*).

damental liberty interest is at stake." J.S.A. at A-23. The Court of Appeals correctly found this provision of the statute to be unconstitutional.

The Court of Appeals adopted the framework utilized in *Santosky* for the purpose of evaluating the constitutionality of this provision. It identified the private interest affected by the bypass proceeding, analyzed whether the standard of proof would increase the risk of erroneous deprivation of that interest, and determined whether there existed a countervailing government interest justifying the standard of proof. It concluded that the "heightened standard of proof unduly burdens the minor plaintiff's right to . . . an abortion" and was thus unconstitutional. J.S.A. at A-23.

In attacking this conclusion, the State urges that this Court utilize a procedural due process test and weigh the interests of the State against those of the minor. *See, e.g.*, State's Brief at 44. This is wrong. A burden on a minor's fundamental right to abortion is to be strictly scrutinized to determine whether it is narrowly tailored to serve a significant state interests not present for adults. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. at 74; *Roe v. Wade*, 410 U.S. at 155; *H. L. v. Matheson*, 450 U.S. at 413.[37]

The extent of this burden seems unarguable. As the Court of Appeals found, "the risk of erroneous deprivation of the mature minor's constitutional right to proceed without parental intervention is significantly increased by the imposition of the clear and convincing standard of proof." J.S.A. at A-23. The same conclusion is true for the minor whose best interests would be harmed by parental involvement.

The State suggests that the fundamental right at issue here is "reduced" because the Ohio statute requires parental notification rather than consent. State's Brief at 45. However, this Court has held that mandatory parental involvement presents an overwhelming burden on the right to abortion. *Bellotti II*,

37 "The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child." *In re Winship*, 397 U.S. 358, 365 (1970).

443 U.S. at 648. The State's position would lead to the bizarre result that under a notice statute a minor must involve a seriously abusive parent in her abortion decision if she is unable to demonstrate that abusiveness clearly and convincingly, while, under a consent statute, she may win an exemption from parental involvement on a lesser showing. The distinction is nonsensical as the ultimate harm to the minor in both situations is identical for all practical purposes.[38]

The State also suggests that the burden imposed by the heightened standard is minimal because the bypass procedure is *ex parte*. This position ignores that, although not literally state-initiated, the initiation of the bypass proceeding is compelled by an action of the state; and that under *Bellotti II*, as the Court of Appeals noted, the burden is already on the minor to *convince* the trier of fact as to her maturity or best interests. J.S.A. at A-23 n.5. Under these circumstances, requiring the minor to assume, also, the risk of an erroneous outcome is hardly a minimal burden.

Standards of maturity or best interests are "imprecise substantive standards that leave determinations unusually open to the subjective values of the judge." *Santosky*, 455 U.S. at 762. Such standards "magnify the risk of erroneous fact-finding." *Id.* Under such circumstances, this Court requires an elevated standard of proof to protect against the "risk that a factfinder might decide to [deprive] an individual [of rights] based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior." *Id.* at 764 (quoting *Addington v. Texas*, 441 U.S. at 427). Here, however, the elevated standard of proof achieves the opposite result for the factfinder is instructed to

38 In an *amicus* brief, Ohio legislators argue that an erroneous determination of a minor's petition hurts her less than her parents: while she retains her right to obtain an abortion, their rights to care and custody are forever lost. Brief of Jerome S. Luebbers, *supra* note 21, at 17-18. This argument ignores the very real burden of parental involvement on the right to obtain an abortion. *Bellotti II*, 443 U.S. at 647, and the fact that the bypass strips parents of no legal right under Ohio or federal constitutional law. *See infra* p. 22.

deprive the young woman of a fundamental right solely because of her failure to marshall clear and convincing evidence.

The State asserts that the heightened standard of proof serves its interest in providing information to parents. State's Brief at 44. The State's invocation of its concern over providing information to parents is inapposite to the bypass procedure. As the Court of Appeals correctly noted:

> [T]he bypass procedure is not designed to facilitate parental involvement. Rather, it is designed to ensure that a minor who is sufficiently mature or whose best interests do not include parental notification is free to exercise her fundamental right to seek an abortion without the burden imposed by parental intervention.

J.S.A. at A-22. Only after the juvenile court has determined that the minor is immature and parental involvement would be contrary to her best interests may the state vindicate its interest in facilitating parental involvement. *Id.*

Similarly incorrect is the State's suggestion that the risk of error should be placed on the minor because her parents' constitutional rights are involved, in that "the bypass procedure is used to temporarily terminate the parents' rights to the custody, care and nurture of their minor daughter." State's Brief at 43 n.21. The Constitution protects parents from state interference with the care and upbringing of their children. *Prince v. Massachusetts*, 321 U.S. 158 (1944). It does not create a right of compulsory parent/child communication, nor does it create a right to state actions to achieve the same result. The bypass does not interfere with parents' rights.[39] They remain free to involve themselves in their daughters' decisions. *Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980). The bypass merely assures that a statutory requirement of parental involvement is not applied in situations where such involvement would unnecessarily or unjustifiably

39 There is no general requirement of parental notification in Ohio law. The Ohio Supreme Court has in fact recognized the doctrine that mature minors may consent to their own medical care. *Lacey v. Laird*, 166 Ohio St. 12, 139 N.E.2d 25 (1956).

burden the exercise of a fundamental right or threaten the health and safety of the minor the state purports to protect.

The Court of Appeals found that "the only possible interest that the State may assert in formulating the specific requirements for the bypass proceeding is to ensure that the proceeding is fair and yields a reliable result." J.S.A. at A-22.[40] That court also found, however, that this reliability is assured by *Bellotti II*'s requirement that the minor in a bypass proceeding *convince* the trier of fact as to her maturity or best interests. J.S.A. at A-23 n.5.[41]

The State has advanced no credible reason why this standard is inadequate. Nor has the State offered a persuasive reason either to abandon the traditional rule that in a proceeding affecting fundamental rights the risk of an erroneous outcome be allocated to the state, or to shift the risk of an erroneous outcome to a young woman asserting that she is mature enough or that her best interests dictate that she make a decision to terminate a pregnancy without parental involvement.

The Court of Appeals correctly found that the heightened standard of proof unduly burdened the rights of minor women. That conclusion should be affirmed.

40 The State agrees. State's Brief at 43.

41 An *amicus* brief filed by Ohio legislators argues that the high percentage of petitions granted in states where bypasses are in effect is evidence that the standard of proof needs to be elevated. Brief of Jerome S. Luebbers *supra* note 21, at 16-17. This is absurd. These figures do not indicate the bypass is a mere "pass-through." Rather, they reflect the reality that the vast majority of bypass petitions are filed by older, more mature teenagers. In Minnesota, 89% of petitions are filed by 16 or 17 year olds. *Hodgson v. Minnesota, Minnesota v. Hodgson*, Nos. 88-1125 and 88-1309, Joint Appendix at A-160. The reason for this is that, with or without mandatory parental notification laws, the overwhelming majority of young teenagers voluntarily involve a parent and those who seek confidentiality tend to be older teenagers. *Telling Parents, supra* note 14. *See also Hodgson v. Minnesota*, 648 F. Supp. at 767 (desire for privacy is a hallmark of maturity).

C. The Ohio Statute Fails To Guarantee Minors Utilizing The Judicial Bypass a Sufficiently Expedited Procedure

1. The Three Week Procedure Poses an Overwhelming Burden on the Right to Abortion

The Ohio statute provides a judicial bypass which can consume three weeks of a young woman's pregnancy.[42] The lower court joined others across the country in finding that this time frame is too long to satisfy constitutional requirements. J.S.A. at A-28. *American College of Obstetricians and Gynecologists v. Thornburgh*, 656 F. Supp. 879, 887-88 (E.D. Pa. 1987); *Glick v. McKay*, 616 F. Supp. 322, 326-27 (D. Nev. 1985). It fails for reasons found in the established medical and economic facts which the State does not dispute.

While abortion is among the safest surgical procedures, its risks increase as pregnancy advances and do so particularly steeply in the second trimester. The three week delay entailed by the Ohio statute could more than double the risk of serious complications from abortion during the second trimester. J.A. at JA-18, Gaujean affidavit ¶ 12. Costs, reflecting the increased complexity of the surgery, rise accordingly from approximately $200 for a first-trimester abortion to $1,000 in the twenty-second week. *Id.* at ¶ 14.[43] Minors, who are more likely to seek later abortions than adult women and have fewer financial resources, will suffer these delays more acutely. *Id.* at ¶ 15. Perhaps the most dire consequence of all is that a three week proceeding can virtually eliminate the choice the young woman seeks to vindicate by delaying her abortion until a stage in her pregnancy where abortions are neither practically nor legally available.[44]

42 The statute's appellate deadlines do not specify whether "days" refers to calendar or business days. The State contends that they are calendar days; this would shorten the appellate time frame. State's Brief at 33-34 n.14. The Court of Appeals, however, ruled that Ohio R. App. P. 14(A), under which deadlines of less than seven days are computed without regard to weekends and holidays (*i.e.*, they are "business" days), applies to the Ohio statute's appellate deadlines. J.S.A. at A-28 n.8. Since the lower courts "are better schooled in and more able to interpret the laws of their respective States," this Court should defer to that interpretation of local law. *Frisby v. Schultz*, 108 S. Ct. 2495, 2500 (1988) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985)).

43 These prices were applicable when this case was filed in 1986.

The Court of Appeals recognized that a three week delay, coupled with these realities, violated this Court's command that judicial bypass proceedings be conducted with sufficient speed to maintain "an effective opportunity for an abortion to be obtained." *Bellotti II*, 443 U.S. at 644, cited in J.S.A. at A-28.

The State argues that this three week delay is consistent with this Court's holding in *Planned Parenthood of Kansas City v. Ashcroft*, 462 U.S. 476 (1983) that the Missouri statute at issue in that case provided a "framework" for an expeditious judicial bypass. This contention ignores the limited nature of the *Ashcroft* holding. In that case this Court looked only at the appellate procedure of the Missouri law and found that the 24 hour deadline for filing a notice of appeal and the five day limit for docketing it created a constitutionally sufficient "framework" for complying with *Bellotti II's* mandate for expediting *appeals*. 462 U.S. at 491 n.16. The Court made no ruling on whether the Missouri law provided constitutionally sufficient expedition at the initial stages of the bypass. Moreover, its ruling on the constitutionality of the appellate phase was provisional and expressly contingent on the promulgation by the Missouri Supreme Court of rules to complete the framework the statute laid out. *Id.* For example, there was no rule setting the time for the appeal to be heard and decided. In contrast, the Ohio statute is a complete statutory scheme which the lower courts considered as a whole and determined lacked constitutionally sufficient expedition.

The State also argues that the statute provides adequate expedition because it allows the Ohio Courts of Appeal to shorten

44 The majority of states make abortion in the third trimester illegal except to save the woman's life or health. Plaintiff currently provides abortions up to the twentieth week of pregnancy. Abortions are unavailable in the state after the twenty-second week.

their appellate deadlines for "good cause shown." This argument ignores several points.

First, the Ohio Courts of Appeal's authority extends only to appellate deadlines, leaving no avenue to shorten the week-long delay at the initial juvenile court stage of the bypass. Second, the making of such a motion will itself consume time. Third, the statute provides no guarantee that the Ohio appellate courts will construe "good cause" to adequately protect minors' rights. For example, will an increase in the cost of the abortion of hundreds of dollars constitute "good cause," or will only a threat that the abortion right will be lost completely suffice? This Court has consistently rejected parental involvement statutes which failed to set a definite standard for courts to judge whether minors were entitled to a waiver of the parental involvement requirement. *Bellotti I*, 428 U.S. 132 (requiring abstention to ascertain the meaning of "good cause"); *Akron I*, 462 U.S. at 440 (striking statute which failed to explicitly create a procedure for a case-by-case ruling on minors' maturity). The same reasoning should apply to a statute which rests a sufficiently expedited procedure upon such a discretionary standard. *Accord Planned Parenthood Association of Nashville v. McWherter*, 716 F. Supp. 1064 (M.D. Tenn. 1989).[45]

Finally, the district court found that the wide geographic dispersion of the Ohio appellate circuits made it unlikely that even well-intentioned appellate courts would be in a position to expedite a hearing at an appellant's request. J.S.A. at A-94-95. Such an assessment of local law and practice is entitled to great deference from this Court. *Frisby v. Schultz*, 108 S. Ct. at 2500.[46]

45 Insofar as this Court believes the "good cause" exception would modify the constitutional issue in this case it should abstain from ruling and certify the question of the meaning of the statute to the Ohio Supreme Court under Ohio Supreme Court Rule XVI. *See supra* note 36.

46 The State's reliance on *Ashcroft* for the proposition that the "good cause" exception saves the statute is misplaced. *Ashcroft's* language that "[t]here is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions" referred to the fact that the Missouri Supreme Court had not as of that time promulgated rules for expedited appeals and that the Court would not presume the constitutional insufficiency of such rules once promulgated. 462 U.S. at 491 n.16. It in no way ruled on the constitutionality of a provision such as Ohio's, which provides for constitutionally sufficient expedition only upon a showing of "good cause."

For these reasons, the Court of Appeals' judgment that the judicial bypass is not sufficiently expedited should be affirmed.

2. The Constructive Authorization Provision Adds Further Undue Delay to the Judicial Bypass Proceeding

The Ohio statute provides that if the juvenile or appellate courts fail to act within the statutory time-frame, an abortion without parental notification is "constructively" authorized. Ohio Rev. Code Ann. §§ 2151.85(B)(1), 2505.073(A); J.S.A. at A-39; A-44-45. Yet, no tangible order is made available to the physician to safeguard him or her from the statute's severe criminal penalties. The Court of Appeals joined other courts which have considered this issue in holding that "a physician would be unwilling to proceed under such circumstances. The resulting confusion can only facilitate delay . . . ." J.S.A. at A-33. *See also Glick v. McKay*, 616 F. Supp. at 325-26; *Planned Parenthood Association of the Atlanta Area v. Harris*, 691 F. Supp. 1419, 1424 (N.D. Ga. 1988); *Barnes v. Mississippi*, No. J86-0458(W), slip op. at 7 (S.D. Miss. July 2, 1986).

The State asserts that the Court of Appeals indulged in "speculation" in finding that no tangible authorization would be available and that physicians would be chilled thereby from their willingness to provide abortions. As to tangible authorization, the statute provides for none. It would be speculation, indeed, for the Court of Appeals to have assumed that such authorization would be provided.[47] So, too, the finding that a lack of clarity in statutory commands has a chilling effect on

47 The State's argument implicitly concedes that tangible authorization *should* be provided.

physicians' willingness to perform abortions which subject them to criminal penalties is hardly idle speculation; it is a determination firmly grounded in prior holdings of this Court. *See, e.g., Colautti v. Franklin*, 439 U.S. 379, 396 (1979).

The State insists, however, that a combination of a date-stamped copy of the minor's complaint and a "docket sheet showing no entry" would assure physicians, in the absence of affirmative communication from the courts, that an abortion could go forward. The State ignores the fact that physicians risk criminal penalties, including imprisonment, as well as revocation of their licenses to practice medicine, for disobeying the statute's commands. The mere absence of an entry in a docket sheet for a particular day would hardly assure a physician facing these consequences that an order denying a minor's petition was not entered. It takes little imagination to foresee a mere clerical delay resulting in a given day's orders not appearing on that day's docket sheet. No physician should be required by the State to play Russian roulette with his or her future.

Additionally, because the Ohio statute provides for an appeal only from a petition actually dismissed by the juvenile court, a sufficiently expedited procedure must provide some remedy should the Ohio courts fail to act within this statutory time frame. The constructive approval provision fails to provide that remedy. The Ohio statute therefore leaves minors remediless while they await a ruling from the juvenile courts.[48] The Court of Appeals judgment, therefore, should be affirmed.

D. The Ohio Statute's Bypass Fails To Guarantee Anonymity To The Minor

Bellotti II requires that procedures to waive parental involvement provide for "anonymity." 443 U.S. at 644. This means procedures in which the minor's identity is neither "known nor acknowledged." *Webster's New World Dictionary of the*

48 The existence of such "constructive order" provisions creates the illusion that a court's inaction will create no harm to minor petitioners, and thereby may heighten the likelihood that busy courts will not meet their timetable.

American Language 1980. The Ohio judicial bypass fails to provide for anonymity for the simple reason that, unless the minor is represented by counsel, she must sign her name to the complaint form which initiates the bypass procedure and even if she has a lawyer, she must supply her parents' names at four different places on each complaint form, J.A. at JA-4, as well as on the Notice of Appeal. J.A. at JA-15.

The State argues that the minor will not have to sign her name because "it is likely that . . . [she] will be provided with an attorney upon arrival in the courthouse." State's Brief at A-32. The statute, however, makes no provision for appointment of counsel before the minor files a complaint. The order of business set out in the statute makes it highly *unlikely* that this will be the case. Under the statute the minor first files a complaint indicating whether she has retained an attorney. § 2151.85(A)(5); J.S.A. at A-39. Then, "if the complainant has not retained an attorney," the juvenile court appoints one. § 2151.85(B)(2); J.S.A. at A-39-A-40. Moreover, the Ohio Supreme Court contemplated the absence of an attorney at the initial filing stage in drafting the complaint forms: "Please note that the enclosed complaint forms are simplified to assist even the unadvised and unrepresented teenager," the Chief Justice of that court wrote in his cover letter to the local courts. J.A. at JA-1.

The State's argument that "the brief time period envisioned" for the statute's judicial bypass makes it likely that the attorney will be provided before the minor files a complaint is belied by the fact that the statute allows five business days between filing of a complaint and the hearing, ample time for appointment of counsel after the complaint is filed.

Moreover, even if the minor walks into the courthouse personally accompanied by a lawyer who signs the complaint for her, she still must provide her parents' names *four times* on the complaint form, a clear breach of her anonymity.

The State argues that despite this breach of anonymity the proceedings are nevertheless "confidential" because state laws compel secrecy on the part of public employees. Plaintiffs do

not argue, as the State contends they do, that these laws will be disobeyed. Rather, these laws are irrelevant because the right to anonymity is broader than the right not to have officials reveal one's identity to the public at large. It is the right to protect one's privacy absolutely, even against those pledged to secrecy themselves.

The necessity for anonymity, rather than mere confidentiality, is obvious. The so-called "confidential" audience of the courthouse can be broad, indeed, including clerks, secretaries, guards, data processors, and judges.[49] Revelation of one's identity to an audience this large will deter many young women from seeking relief from the juvenile courts. *See Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 766 (1986). Requiring the minor to relinquish her privacy before a host of strangers in order to secure it against her parents undermines the very constitutional right the bypass is meant to protect.[50]

The State relies on this Court's ruling in *Ashcroft*, sustaining a Missouri statute that required the minor to sign her name and reveal her parents' names on the petition to waive parental consent. The *Ashcroft* Court, however, never ruled on those provisions of the Missouri law. Rather, the Court noted only that *other* provisions of the law, which allowed the minor to file the petition under her initials, assured anonymity.[51] 462 U.S. at 490

49 In addition, neither the statute nor court rules provide for record-keeping that will separate these papers from others available to the public, or protect them from casual observation as they sit on desks and countertops in court offices open to the public. *See* J.S.A. at A-96.

50 Truly anonymous proceedings are not difficult to achieve. Massachusetts provides, via a standing judicial order, that minors may file petitions pseudonymously and that an affidavit with the minor's true name be placed in a sealed envelope to accompany her complaint. *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1025 (1st Cir. 1981), cited at J.S.A. at A-26 n.7.

51 Additionally, the Missouri statute allowed the minor to avoid revealing her name by allowing a "next friend" to file for her, *Ashcroft*, 462 U.S. at 479 n.4, a provision absent from the Ohio law.

n.14. It would have been self-contradictory for the Court to have ruled that the use of initials adequately protected the minor's anonymity but that she, nevertheless, could be required to reveal her name. Surely, a decision of this Court cannot be read to reach such a self-contradictory conclusion.

The Court of Appeals correctly concluded that the Ohio judicial bypass failed to guarantee constitutionally sufficient anonymity.

III. THE OHIO STATUTE'S BYPASS PROCEDURE VIOLATES THE MINOR'S RIGHT TO PROCEDURAL DUE PROCESS

The State argues that this Court's inquiry into the constitutionality of the statute should end upon a finding that the Constitution does not require exemption from parental notification for mature or best interest minors. State's Brief at 28. This argument ignores the fundamental proposition that the constitutional guarantee against deprivation of property or liberty without due process of law applies to interests the state creates voluntarily as well as those the Constitution mandates. *Goss v. Lopez*, 419 U.S. 565, 574 (1975). Therefore, regardless of whether the Ohio statute's exemptions from parental notification are a matter of Constitutional obligation or policy choice, due process[52] entitles a minor to a fundamentally fair proceeding to determine her entitlement to avoid unnecessary or hostile parental involvement. *Id.* (having created a right to public education absent student misconduct, the state must provide a fundamentally fair procedure to determine if such conduct has occurred); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31 (1982) (state created remedies against employment discrimination must comport with due process). The Ohio statute's judicial bypass is not a fundamentally fair proceeding.

52 This was not an issue reached by the lower court because they viewed this case as controlled by *Bellotti II*.

A. The Ohio Statute Creates a Property Interest Which Entitles A Minor To A Hearing That Comports With Due Process

Due process applies when the State creates a benefit that can be granted or withheld only for limited reasons. *Logan*, 455 U.S. at 430; *Olim v. Wakinekona*, 461 U.S. 238, 248-49 (1983). For example, a statute that creates a right to public education, absent misconduct, triggers a due process requirement of a fundamentally fair hearing on allegations of misconduct that may lead to a denial of that right, *Goss*, 419 U.S. at 574, and a law that provides public employees cannot be fired except "for cause" gives rise to a due process requirement for a fair procedure to determine if "cause" exists. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 539 (1985). The Ohio statute creates a right to be free of parental involvement if a minor can demonstrate that she is mature or that parental involvement would be against her best interests. Due process, therefore, entitles a minor to a fair procedure by which she can demonstrate that those circumstances exist.

The types of interests protected as property interests under the Due Process Clause are "significant" interests, *id.* at 542, and are as varied as the "whole domain of social and economic facts." *Logan*, 455 U.S. at 430 (quoting *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949)). They include a horse trader's license, *Barry v. Barchi*, 443 U.S. 55 (1979); welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254 (1970); and public education, *Goss*, 419 U.S. 565. A minor's interest in avoiding hostile parental involvement in her abortion decision is equal to or greater than any of these.

Additionally, this Court has established that when the state provides procedures to secure a state-created right, those procedures must comply with federal due process requirements. In *Cleveland Board of Education*, 470 U.S. 532, the Board argued that the procedures it provided for a hearing on public employees' dismissals were not subject to review under the federal Due Process Clause because any "additional procedures would in effect expand the scope of the property interest itself." *Id.* at 540. Justice White, writing for the Court, rejected any notion

that beneficiaries of state entitlement must take "the bitter" (the limited state-created remedy) with "the sweet" (the state-created right):

> If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

Id. at 541 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974)) (Powell, J., concurring in part and concurring in result in part). *See also Logan*, 455 U.S at 432; *Evitts v. Lucey*, 469 U.S. 387, 400-401 (1985) (although the Constitution gives criminal defendants no right to appeal their convictions, an appeal, once provided, must comport with due process). Accordingly, this Court must determine whether the State of Ohio has provided a constitutionally sound procedure for minors to establish their entitlement to an exemption from parental notification.

B. The Ohio Judicial Bypass Does Not Comply With Due Process

Due process requires, at a minimum, an opportunity to be heard at a meaningful time and in a meaningful manner. *Logan*, 455 U.S. at 437. Whether a state-created procedure conforms to these criteria is determined by balancing three factors:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the proba-

ble value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Applying the *Mathews* factors to the Ohio statute's judicial bypass establishes that it fails to accord minors due process of law in establishing their entitlement to an exemption from parental notification.

1. The Pleading Requirement Deprives Minors of an Opportunity to be Heard

The due process requirement of an opportunity to be heard, *Cleveland Board of Education*, 470 U.S. at 542, includes a "fair opportunity to obtain an adjudication on the merits . . ." *Evitts*, 469 U.S. at 405. Accordingly, this Court has struck down procedural rules which sever a litigant's right to be heard for reasons which are "arbitrary with respect to the issues involved." *Id.* at 404. For example, in *Evitts*, this Court ruled that a criminal defendant was denied effective assistance of counsel and, therefore, due process, when a state court refused to hear the merits of his appeal because of the failure of his lawyer to file a purely informational "Statement of Appeal." *See also Logan*, 455 U.S. 422 (invalidating a Pennsylvania statute which cut off a litigant's right to a hearing on an employment discrimination claim if the state agency failed to follow certain procedures).[53]

The judicial bypass pleading requirement operates similarly to the procedural rule in *Evitts*. It deprives the minor of her right to a full and fair adjudication on the merits of her entitle-

53 The state may enact reasonable procedural rules that have the effect of terminating a litigant's rights. The litigant, however, must be given unambiguous notice of such rules. *Thomas v. Arn*, 474 U.S. 140, 155 (1985). No notice is given an Ohio minor that choosing the wrong form cuts off her right to demonstrate her entitlement to waiver on an alternative basis. Moreover, even if such notice were given, the rule is not reasonable as it serves no legitimate state interest. *See infra*, p. 35.

ment to the statutory exemptions for maturity or best interests on a basis which is "arbitrary with respect to the issue involved." There is simply no relationship between technical pleadings errors and the merits of the statutory exemptions the statute creates.[54]

Application of the *Mathews* factors confirms this. The private interest at stake in these proceedings is substantial and has been discussed throughout this brief. It is the minor's interest in avoiding the burdens of compelled parental involvement, including delay, abuse and obstruction of her choice. *Compare Logan*, 455 U.S. at 434 (individual interest in remedying employment discrimination is substantial). The risk of an erroneous deprivation of the minor's rights, the second *Mathews* factor, is also substantial. Should the minor fail to plead either maturity or best interests as the basis for her entitlement to an exemption from parental involvement, the right to that exemption is forever lost. *See Cleveland Board of Education*, 470 U.S. at 543-44 (denying employee opportunity to state his side of the case before dismissal heightens the likelihood of an erroneous deprivation of his rights). The risk is heightened by the subjective nature of these terms and the fact that no prior notice is given the minor that a failure to plead may irreversibly sever her rights. The more logical approach—requiring the juvenile court to hold a hearing on both the minor's maturity and best interests—greatly reduces the risk of error. It is difficult to imagine what governmental interest mandates this pleading "trap." J.S.A. at A-20. Although the State alleges a fear of "fishing expedition[s]," State's Brief at 40, this is exaggerated in view of the limited nature of the inquiry: the statute creates only two grounds for the exemption from parental notification: maturity and best interests. Moreover, if the juvenile court finds in favor of the minor on either ground it need not go on to the other. Only in situations where it does not, would it be required to make an alternative finding.

54 Nevertheless, the State has argued that Ohio Rule of Juvenile Procedure 22 allowing amendments to pleadings "in the interest of justice" cures any unfairness of the bypass proceeding. This is an appropriate issue for abstention, however. See *supra* notes 36, 45.

The *Mathews* factors weigh heavily against the constitutionality of the pleading rules of the Ohio statute and court rules. They are a deprivation of due process and must be held unconstitutional.

2. Failure to Provide an Expedited Procedure Deprives Minors of a Hearing at a "Meaningful Time"

Due process requires that a hearing be held at "a meaningful time and in a meaningful manner." *Logan*, 455 U.S. at 437 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Most of this Court's "meaningful time" cases have focused on whether due process requires a hearing before or after an initial withdrawal of a property interest. *Compare Goldberg v. Kelly*, 397 U.S. 254 with *Mathews v. Eldridge*, 424 U.S. 319. One thing is clear, however. Whatever process is due must be accorded the litigant before *final* deprivation of the property or liberty interest involved. *Logan*, 455 U.S. at 433. The three week delay entailed in the Ohio statute fails to provide a hearing at a meaningful time because a minor can experience a "final deprivation" of her property interest, literally while she waits for her case to be heard. Within the three weeks' delay permitted by the statute, her pregnancy can progress to a point at which abortion is no longer legally or practically available.[55]

Applying the *Mathews* factors, it is clear that the individual's interest in avoiding delay is great, as delay can raise the cost and the health risks or make abortion completely unavailable. The risk of an erroneous deprivation of rights is also great as the minor's right will literally expire after a short passage of time, whereas expedited procedures could lessen the likelihood of this deprivation. As to the third *Mathews* factor, the State has advanced no justification for the delay envisioned by the statute.

The Ohio statute's delay cannot meet constitutional standards.

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55 *See supra* p. 24.

3. Failure To Provide Anonymity Deprives Minors of a Hearing in a "Meaningful Manner"

The Ohio statute's requirement that the minor sign her name and provide her parents' names violates the requirement that hearings be conducted in a "meaningful manner." A procedure designed to protect a minor's privacy can hardly be meaningful when it requires her to reveal identifying information.

Applying the *Mathews* factors, the minor's individual interest in privacy is strong, for that is precisely the reason she has pursued the bypass option. The risk of an erroneous deprivation of her rights is also great. The very right to privacy the statute seeks to protect is put at risk by the number of persons with access to information about her. In small towns, the risks may be heightened by the prospect that courtroom personnel know her or her parents. Alternative procedures, such as allowing the minor to proceed under a pseudonym and sealing any identifying information, are simple and will cure the harm completely. The State has articulated no interest whatever at any stage of this litigation in having the minor reveal her name or that of her parents or papers that are not under seal. The Ohio bypass procedure's failure to provide anonymity to the minor, therefore, deprives her of due process of law.

4. The Clear and Convincing Evidence Standard of Proof Violates Procedural Due Process

The Court of Appeals utilized the *Mathews* factors[56] to conclude that the Ohio statute's requirement that the minor prove her entitlement to a waiver of parental notification by clear and convincing evidence posed an unconstitutional burden on her substantive due process right to abortion. J.S.A. at A-23. The conclusion is the same if the issue is analyzed purely on the grounds of procedural due process.

The private interest at stake is the same and remains substantial: the minor's interest in avoiding the burden of parental

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56 The Court of Appeals used the *Mathews* factors, as adapted to the standard of proof issue in the case of *Santosky v. Kramer*, 455 U.S. 745.

notification, a burden which can amount to a *de facto* veto of her choice, *Bellotti II*, 443 U.S. at 647. Even if this Court were to hold that a minor's interest does not attain constitutional dimensions, it remains "particularly important" and "more substantial than mere . . . money." *Santosky*, 455 U.S. at 756 (quoting *Addington v. Texas*, 441 U.S. at 424), and, therefore, the type of interest this Court has held militates against placing the risk of error on the individual.

Furthermore, parental interests, which the State asserts somehow "reduce" the minor's interest, are as irrelevant to the procedural due process issue discussed here as they are to the substantive due process issue discussed in Point II.B *supra*. Whether the Ohio judicial bypass results from constitutional compulsion or policy choice, the inquiry at issue in that proceeding focuses solely on the minor: her maturity and what would serve her best interests. Although the State might like the legislature to have passed a statute with a bypass procedure that takes account of parental interests, that is not the statute involved in this case.

The second *Mathews* factor, the risk of an erroneous outcome, is heightened by the clear and convincing standard of proof. The issues at stake in the bypass are subjective ones: "maturity" and "best interests." As this Court recognized in *Santosky*, 455 U.S. 745, when it analyzed a similarly subjective issue (parental "fitness"), allocating the risk of error against the individual in this situation could "misdirect the fact-finder in the marginal case," *id.* at 764, and heighten "the possible risk that [he or she] . . . might decide to [deprive] an individual [of rights] based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior." *Id.* (quoting *Addington*, 441 U.S. at 427). The same principle applies here. Requiring the minor to prove maturity or best interests by clear and convincing evidence forces her to bear the risk that the fact-finder will resolve doubts on these subjective matters against her, rather than against the state.

In contrast, the "value . . . of [a] . . . substitute procedural safeguard[ ]"—*i.e.*, a requirement that the minor "convince"

the fact finder of her maturity or best interest, J.S.A. at A-23 n.5—addresses this risk by instructing the fact finder not to resolve doubts against the minor.

Arrayed against the minor's substantial private interest and the heightened risk of its erroneous deprivation is the third *Mathews* factor, "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335. The State has identified no "fiscal or administrative" interest served by requiring the minor to bear the risk of error. The only interest the State articulates is in the "reliability" of the procedure. Yet, it fails to explain why requiring the minor simply to "convince" the fact finder of her maturity or best interests is inherently unreliable.

The three *Mathews* factors, therefore, weigh against requiring the minor to bear the risk of error in the judicial bypass proceeding. The clear and convincing evidence standard violates both substantive and procedural due process and must be found unconstitutional.

IV. THE PHYSICIAN NOTICE REQUIREMENT SIGNIFICANTLY BURDENS A MINOR'S RIGHT TO ABORTION AND, STANDING ALONE, RENDERS THE ENTIRE ACT UNCONSTITUTIONAL

A. The Physician Notice Requirement Significantly Burdens Minors' Right to Abortion

The Ohio statute requires that the physician who performs the abortion personally notify the minor's parent. The Court of Appeals correctly held that this requirement was unconstitutional pursuant to this court's holding in *Akron I*, 462 U.S. 416, that states may not require physicians personally to obtain informed consent from patients.

In *Akron I*, this Court held that the State's interest in the patient's informed consent would be served as well if the physician delegated the task of informed consent counseling to another trained professional. "The State's interest is in ensur-

ing that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it." *Id.* at 448. Similarly, there is no conceivable reason why the task of providing the statutorily required parental notification cannot be performed by a qualified individual other than the woman's physician.

The State argues that its interest in having physicians notify parents is somehow broader and weightier than the City of Akron's interest in obtaining informed consent from patients. It purportedly entails "obtaining family medical history, psychological history and . . . asking any necessary follow-up questions," the State says. State's Brief at 47. But a dialogue with patients on these matters is exactly what informed consent counseling entails and exactly what this Court said physicians must be permitted to delegate to others. 462 U.S. at 447-49 and nn.38, 41.

Regardless, the State's argument proves too much and too little. Nothing in the mere requirement of physician notification guarantees or makes it more likely that the physician will undertake the in-depth dialogue the State hopes for. Conversely, there is nothing that prevents a physician from doing so when he or she delegates the task of locating and notifying parents to a subordinate.[57]

The State also faults the lower courts for assuming, without a supporting record, that physician notification would increase the cost of an abortion. The district court, however, assumed that this Court's prior decisions had settled the applicable legal and factual principles at issue. It, therefore, found it unnecessary to take testimony on the issue of cost or burden on the right to abortion. J.S.A. at A-79, citing *Akron I*, 462 U.S. at 447.[58]

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57 The State's argument must be taken with a grain of salt, however, as its previous arguments focused on the "ministerial" nature of parental notification and its consequent *de minimis* cost. J.S.A. at A-79.

58 If this Court is inclined to reconsider its holding in *Akron I*, plaintiffs urge it to remand this case for findings of fact on that issue.

Finally, the State argues that the reasoning of the Court of Appeals is inconsistent with *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) where this Court upheld a viability testing procedure which the State of Ohio here claims "unquestionably increased the cost of an abortion." In so doing, the State ignores Justice O'Connor's concurring opinion, which noted that the Missouri law at issue in that case added little if any cost to existing medical practice and served the state interest in insuring that a fetus was not viable. 109 S. Ct. at 3063 (O'Connor, J., concurring). In contrast, the physician notification requirement here will require more than a minimal increase in the cost of abortions and, more importantly, serves no discernible state interest that would not be served equally well by having another professional perform the notification task.

B. The Invalidity Of The Physician Notice Provision, Standing Alone, Renders The Entire Statute Invalid

The invalidity of the requirement that physicians personally perform parental notification renders the entire statute invalid. As the District Court found, and the State has not disputed, neither this, nor any other provision of the statute, is severable. J.S.A. at A-98. Standing alone, therefore, the invalidity of the physician notice requirement provides an independent basis to affirm the judgment below.

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

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REPLY

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OCTOBER TERM, 1989

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, et al.,

Appellees.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

REPLY ARGUMENTS 1

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT MANDATE A JUDICIAL BYPASS PROCEDURE FOR A PARENTAL NOTICE STATUTE 1

A. No Decision of this Court Has Held That a Parental Notice Statute Must Contain a Judicial Bypass Procedure 1

B. A Parental Notice Requirement Does Not Impose a Burden Equivalent to Parental Consent 2

II. OHIO'S JUDICIAL BYPASS PROCEDURE SATISFIES THE REQUIREMENTS OF DUE PROCESS 6

A. The Pleading Forms Allow a Minor to Demonstrate Her Maturity and Best Interest 7

B. The Clear and Convincing Burden of Proof is Fair and Yields a Reliable Result 9

C. The Statute Provides an Expedient Time-Frame 12

D. The Statute and the Laws of Ohio Combine to Assure a Minor of the Confidential Nature of the Judicial Bypass Procedure 14

PAGE

III. THE OHIO STATUTE DOES NOT CREATE A PROTECTED PROPERTY INTEREST AND THEREFORE IS NOT SUBJECT TO THE SCRUTINY OF PROCEDURAL DUE PROCESS REQUIREMENTS 15

IV. OHIO'S PHYSICIAN NOTICE REQUIREMENT IS NOT AN INFORMED CONSENT STATUTE AND FURTHERS THE STATE'S LEGITIMATE INTEREST IN PROTECTING A PREGNANT MINOR 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES PAGE

Akron v. Akron Center for Reproductive Health,
462 U.S. 416 (1983) 1, 2, 3, 8, 13, 18, 19

Atkins v. Parker,
472 U.S. 115 (1985) 16

Atkinson v. Grumman Ohio Corp.,
37 Ohio St. 3d 80, 523 N.E.2d 851 (1988) 13

Bellotti v. Baird,
428 U.S. 132 (1976) 13

Bellotti v. Baird,
443 U.S. 622 (1979) ..... *passim*

Bishop v. Wood,
426 U.S. 341 (1976) 16

Board of Regents v. Roth,
408 U.S. 564 (1972) 16

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 12

Cross v. Ledford,
161 Ohio St. 469, 120 N.E. 2d 118 (1954) 11

Frisby v. Schultz,
108 S. Ct. 2495 (1988) 5

Goldberg v. Kelly,
397 U.S. 254 (1970) 17

Goss v. Lopez,
419 U.S. 581 (1975) 16

CASES **PAGE**

H. L. v. Matheson,
450 U.S. 398 (1981) 1, 2, 3, 6, 18, 19

Harper v. Virginia State Bd. of Elections,
383 U.S. 663 (1966) 6

Hartigan v. Zbaraz,
484 U.S 171 (1987) 2

Hewitt v. Helms,
459 U.S. 460 (1983) 16

Mathews v. Eldridge,
424 U.S. 319 (1976) 9, 10

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 16

Ohio v. Dickinson,
28 Ohio St.2d 65, 275 N.E.2d 599 (1971) 5

Parham v. J.R.,
442 U.S. 584 (1979) 5

Planned Parenthood Ass'n v. Ashcroft,
462 U.S. 476 (1983) 6, 7, 11, 12, 14, 15

Schenley v. Kauth,
160 Ohio St. 109, 113 N.E.2d 625 (1953) 13

Texaco, Inc. v. Short,
454 U.S. 516 (1982) 17

United States v. Allred,
155 U.S. 591 (1895) 13

United States v. Clark,
445 U.S. 23 (1980) 7

CASES **PAGE**

United States v. Salerno,
481 U.S. 739 (1987) 6

Webster v. Reproductive Health Services,
109.S. Ct. 3040 (1989) 4, 6, 19

STATUTES AND RULES

Ohio Revised Code Ann. §1.50 11

Ohio Revised Code Ann. §102.03(B) 15

Ohio Revised Code Ann. §102.99 15

Ohio Revised Code Ann. §102.99(B) 15

Ohio Revised Code Ann. §2151.85(B)(1) 13

Ohio Revised Code Ann. §2151.85(D) 15

Ohio Revised Code Ann. §2151.85(F) 15

Ohio Revised Code Ann. §2505.073 13

Ohio Revised Code Ann. §2505.073(B) 15

Ohio Revised Code Ann. §2919.12(B)(1)(2) 13

Ohio Appellate Rule 14(B) 13

Ohio Rule of Civil Procedure 1 8

Ohio Rule of Civil Procedure 15(B) 8, 9

Ohio Juvenile Rule 1 8

Ohio Juvenile Rule 1 (B)(3) 8

Ohio Juvenile Rule 1 (B)(4) 8

PAGE

OTHER AUTHORITIES

Black's Law Dictionary (5th ed. 1979) 11

Horowitz, *Adolescent Mourning Reactions to Infant and Fetal Loss*, 59 Social Casework 551 (1978) 4

Scott, *Legal and Ethical Issues in Counseling Pregnant Adolescents*, in Adolescent Abortion: Psychological and Legal Issues (G. Melton ed. 1986) 3

Teitze, *Repeat Abortion Why More?*, 10 Fam. Plan. Persp. 205 (1978) 4

REPLY ARGUMENTS

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT MANDATE A JUDICIAL BYPASS PROCEDURE FOR A PARENTAL NOTICE STATUTE.

A. No Decision of This Court Has Held That a Parental Notice Statute Must Contain a Judicial Bypass Procedure.

Appellees ("Plaintiffs") contend this Court already has decided the question of whether a parental notice statute must contain a judicial bypass procedure. They cite *Bellotti v. Baird*, 443 U.S. 622, (1979) (*"Bellotti II"*), *H.L. v. Matheson*, 450 U.S. 398 (1981) and *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (*"Akron I"*) for this proposition. Plaintiffs' Brief at 4. Plaintiffs' reliance on these authorities is misplaced.

Bellotti II is a plurality opinion with Justice White dissenting from the judgment of the Court. 443 U.S. at 656 (White, J., dissenting). Four other Justices, although concurring in the judgment, expressly noted that the *Bellotti II* decision only addressed the constitutional requirements of a parental consent statute. "Neither Danforth nor this case determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto." *Id.* at 654 n. 1 (Stevens, J., concurring). Plaintiffs overlook this explicit limitation on the holding of *Bellotti II*.

Plaintiffs are similarly mistaken in their interpretations of *Matheson* and *Akron I*. They contend the sum of the concurring and dissenting votes in *Matheson* support a holding that a bypass procedure is required for parental notice as it applies to mature minors or minors whose best interests would not be served through notification. Plaintiffs disregard the plain language in *Matheson* which expressly limits its holding. Writing for the Court, Chief Justice Burger stated:

> Appellant challenges the statute as unconstitutional on its face. She contends it is overbroad in that it can be construed to apply to all unmarried minor girls, including those who are mature and emancipated. We need not reach that question since she did not allege or proffer any evidence that either she or any member of her class is mature or emancipated.

450 U.S. at 405-06.

Even the concurring opinion of Justice Powell recognizes this limitation. Justice Powell joined the opinion of the Court "on the understanding that it *leaves open* the question whether [the Utah statute] unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification." *Id.* at 414 (Powell, J., concurring) (emphasis added).

Likewise, *Akron I* did not present the Court with the opportunity to review the constitutionality of a parental notification requirement as applied to all unmarried and unemanicipated minors. The case only raised a challenge to the constitutionality of a municipal ordinance requiring parental consent. 462 U.S. at 422 n. 4.

Therefore, Plaintiffs incorrectly represent that the State asks this Court to reconsider settled legal principles and ignore the doctrine of stare decisis. Plaintiffs' Brief at 11-12. Although this is the second time the Court has been presented with a challenge to the constitutionality of a parental notice statute as it applies to all unemancipated and unmarried minors, the issue has not yet been resolved.[1]

B. A Parental Notice Requirement Does Not Impose a Burden Equivalent to Parental Consent.

[1] This issue was presented in *Hartigan v. Zbaraz*, 484 U.S. 171 (1987) but no opinion was rendered as the case was affirmed by an equally divided court.

Plaintiffs contend a parental notice requirement imposes the same burden on a pregnant minor as a consent requirement and that this Court has never before made a distinction between laws requiring parental consent and laws requiring notification. Plaintiffs' Brief at 12. Plaintiffs once again ignore express language from this Court's decisions. In *Matheson*, the Court stated "[i]n *Bellotti II* . . . we expressly declined to equate notice requirements with consent requirements." 450 U.S. at 411 n. 17. Moreover, the difference between notice and consent has been the subject of extensive discussion. *See* 450 U.S. at 420-425 (Stevens, J., concurring); *Akron I*, 462 U.S. at 469 n. 12 (O'Connor, J., dissenting). Clearly, this Court has recognized a difference between notice and consent for purposes of due process analysis.

Plaintiffs are equally unpersuasive in their attempt to equate a notice requirement with a consent requirement. They presume that notification will lead to an epidemic of parental abuse and therefore will have the same veto effect as a consent provision. Plaintiffs' Brief at 7 n. 18. Contrary to Plaintiffs' assertions, most parents will support their daughters during an adolescent pregnancy.[2] Empirical evidence shows that pregnant teenagers overestimate the negativity of their parents' reactions.[3] Thus, Plaintiffs' contention that minors have well founded fears about abusive parental reaction, (Plaintiffs' Brief at 6-7), is not an accurate representation of how most parents will respond.

[2] Scott, *Legal and Ethical Issues in Counseling Pregnant Adolescents*, in Adolescent Abortion: Psychological and Legal Issues (G. Melton ed. 1986) at 125. (A teenager in any crisis situation may benefit from the support of parents and there is empirical evidence that it is beneficial to teenagers undergoing abortion to have such support); See also Brief of Focus on the Family and Family Research Council as *Amicus Curiae* in Support of Appellant at 15 and sources cited.

[3] See Scott, *Legal and Ethical Issues in Counseling Pregnant Adolescents*, in Adolescent Abortion: Psychology and Legal Issues (G. Melton ed. 1986) at 125.

Moreover, the positive aspects of parental consultation cannot be disputed. Parents can help alleviate a minor's feelings of isolation and insecurity surrounding her decision of whether to have the abortion or carry the child to term.[4] They can be instrumental in curtailing the problem of repeat or replacement pregnancies,[5] are better suited to evaluate the medical ramifications of an abortion, and help the minor weigh her available options.[6] Notwithstanding Plaintiffs' accusations, the State is not asking this Court to ignore the very real fears and needs of young women. Plaintiffs' Brief at 7. Rather, the State asks this Court to uphold the legislature's determination that minors have a very real need for parental guidance in their decision-making process.

Further, Plaintiffs' argument utterly ignores the fact that the Ohio Statute is being reviewed pursuant to a facial challenge.[7] Therefore, on a facial review, the Statute must be interpreted in a manner that avoids constitutional difficulties.[8] *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3060 (1989) (O'Connor, J., concurring); *Frisby v. Schultz*, 108 S. Ct. 2495, 2504 (1988). Plaintiffs' speculation about parental abuse in Ohio is misplaced, particularly in view of the long-standing presemption that parents generally do act in their child's best interests. *See Parham v. J. R.*, 442 U.S. 584, 602-03 (1979). This presumption is no less applicable to the subject of this case.

Plaintiffs' position is not enhanced by their argument that the Ohio Legislature recognized that a notice requirement could serve to block a minor's abortion decision. They speculate that the legislature inferred this by including a bypass procedure in the Statute.[9] Plaintiffs' Brief at 13. It is equally, if not more, plausible that the Ohio Legislature included a bypass procedure in the Statute because of its uncertainty as to whether due process requires such a procedure. What the Ohio Legislature plainly did conclude is that minors should receive guidance from their parents before making a decision as grave as whether or not to bear a child.

Finally, Plaintiffs' argue that Ohio can assert no legitimate interest in requiring parental notice for mature minors or minors whose best interests would not be served through notification. Plaintiffs' Brief at 15. This argument presumes a constitutional standard which this Court has never recognized. Specifically, the Constitution has never been interpreted to require that an age classification apply with complete precision. This is evident from the fact that states have long had the authority to impose age restrictions on minors even when the regulation restricts the exercise of

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[4] See Brief of Concerned Women of America as *Amicus Curiae* for Appellants at 22-23 n. 11 and sources cited.

[5] *Id.* at 23; Horowitz, *Adolescent Mourning Reactions to Infant and Fetal Loss*, 59 Social Casework 551, 553-554, 558 (1978); Teitze, *Repeat Abortion Why More?*, 10 Fam. Plan. Persp. 205, 268 (1978). See also Brief of Focus on the Family and Family Research Council as *Amicus Curiae* in Support of Appellant at 11-12 and sources cited.

[6] Brief of Focus on the Family and Family Research Council as *Amicus Curiae* in Support of Appellant at 15.

[7] Plaintiffs have made multiple references to *Hodgson v. Minnesota* (Nos. 88-1125 and 88-1309) and place reliance on the eighteen volume factual record developed in the "as-applied" challenge to Minnesota's Statute. *See, e.g.*, Plaintiffs' Brief at 7 n. 20, 13-14 n. 30, and 23 n. 41. The State of Ohio is not required to defend a factual record never placed before the lower courts and it is beyond cavil that any such reliance is misplaced.

[8] Despite the fact that this case involves a facial challenge, Plaintiffs suggest that the Court remand the case for development of a factual record if it entertains any doubts about the burden of parental notification.

[8] *cont.*
Plaintiffs' Brief at 14 n. 30. There is no factual record for the district court to develop unless, of course, the Statute is declared constitutional and reviewed after it has been in operation.

[9] The Ohio Legislature does not maintain any recorded legislative history. *Ohio v. Dickinson*, 28 Ohio St. 2d. 65, 67, 275 N.E.2d 599 (1971). Therefore, any supposition on the legislature's intent by Plaintiffs is merely speculation.

a fundamental right such as the right to travel, marry and contract.[10] The fundamental right to vote and to participate in the electoral process, a right that is lost if not exercised timely, is restricted based on age. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966). Such laws have not been rendered invalid because they failed to account for the maturity levels or other special circumstances of each individual minor. Accordingly, "a state legislature has constitutional power to utilize, for purposes of implementing a parental notice requirement, a yardstick based upon the chronological age of unmarried, pregnant women. That this yardstick will be imprecise or even unjust in particular cases does not render its use by a state legislature impermissible under the Federal Constitution." *Matheson*, 450 U.S. at 425 (Stevens, J., concurring).

Although a parental consent requirement cannot be imposed without a bypass procedure, this is because consent entails the potential for a third-party veto over the minor's decision.[11] A burden of this magnitude is not imposed by a statute that does no more than require parental notice. Therefore, due process does not mandate the inclusion of a bypass procedure in a parental notice statute.

II. OHIO'S JUDICIAL BYPASS PROCEDURE SATISFIES THE REQUIREMENTS OF DUE PROCESS.

"Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 493 (1983). To prevail in this facial challenge Plaintiffs must "establish that no set of circumstances exists under which the act would be valid." *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3060 (O'Connor , J., concurring) (quoting *United States v.*

[10] See Brief of the Knights of Columbus as *Amicus Curiae* in Support of Appellant at 5-11.

[11] See discussion in Brief for Appellant at 24-28.

Salerno, 481 U.S. 739, 745 (1987)). Contrary to these guidelines of statutory construction, Plaintiffs have blithely ignored not only the laws of Ohio, but also the bounds of plausibility to create a construction which might violate the standards laid out in *Bellotti II*. As the Court has held, if one among alternative constructions would involve serious constitutional difficulties, that interpretation should be rejected in favor of another. *United States v. Clark*, 445 U.S. 23, 33-34 (1980). Plaintiffs' strained interpretation of the Statute does not follow these guidelines of statutory construction. Accordingly, the Plaintiffs' technical manipulation of the Statute cannot prevail.

In Ohio's construction of the judicial bypass procedure the pleading forms allow the minor the opportunity to prove both her maturity and her best interest. The standard of proof used in the *ex parte* proceeding to prove her maturity or best interest does not unduly burden the minor's rights. The Statute and Ohio law ensures an expeditious time frame and a confidential forum for the minor. The Ohio Statute must be found constitutional.

A. The Pleading Forms Allow a Minor to Demonstrate Her Maturity and Best Interests.

Bellotti II entitles a pregnant minor "to show *either* that she is mature *or* that the desired abortion would be in her best interests." *Bellotti II*, 443 U.S. at 646 (emphasis added). The pleading forms created by the Ohio Supreme Court, in conformance with the Statute, allow the minor to file a complaint containing either an allegation that she is mature or that parental notice would not be in her best interests or both. *See* (JA-6-14). Contrary to Plaintiffs' assertions, this Court does not require a minor to plead both maturity and best interest. Rather, the Court requires an opportunity to present either or both for consideration. As the Court held in *Ashcroft*, "[t]he State must provide an alternative procedure whereby a pregnant minor *may demonstrate* that she is sufficiently mature to make the abortion decision herself *or* that, despite her immaturity, an abortion would be in her best interests." *Ashcroft*, 462 U.S. at 491 (citing

Akron I, 462 U.S. at 439-440) (emphasis added).

Under the Ohio Statute, the minor has the *opportunity* to plead either maturity or her best interests or both, as *Bellotti II* requires. However, she is not compelled to raise both allegations.[12] Plaintiffs' position is not furthered by suggesting that the goal of the pleading framework is to "entrap" the minor. Plaintiffs' Brief at 18. This characterization is not a fair representation of the legislature's intent and exaggerates the complexity of the pleadings. The pleadings, quite simply, require a minor to initiate her claims. Moreover, regardless of the form chosen, the minor is not locked into that choice. Ohio's Civil Procedure and Juvenile Rules provide for liberal amendment.

Plaintiffs argue that once the minor selects a form she cannot effectively amend her complaint. Plaintiffs' Brief at 18. This argument disregards the rules of juvenile courts of Ohio. Ohio Juvenile Rule 1 (B)(3) and (4) require the juvenile rules to be construed in the best interests of the child. Ohio Juv. R. 1 (Reply Brief Appendix, "ra"-3). Plaintiffs allege the standard "when the interests of justice require" is insufficient to safeguard a minor who wishes to change her complaint. Plaintiffs' Brief at 18. In an *ex parte* proceeding, because there is no opposing party to whom notice *must* be given to avoid prejudice, interests of justice would be served by amendment of the pleadings. *See* Ohio R. Civ. P. 15(B), (ra-2).[13]

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[12] A minor may allege she is mature enough to make this decision and at the same time may not desire to place her parents and their care for her at issue in this proceeding. Ohio's pleading framework allows for this possibility, rather than creating a trap as characterized by Plaintiffs. Plaintiffs' Brief at 18. *Bellotti II* does not mandate a minor must make such an allegation. Surely it is more damaging to the minor and her family to require a minor, against her will, to make allegations concerning the quality of care provided by her parents at a time when she is particularly vulnerable.

[13] Ohio Rules of Civil Procedure apply to all juvenile proceedings unless a specific rule of juvenile procedure conflicts with the civil rules. Ohio R. Civ. P. 1. (ra-2) Accordingly, Ohio Rule of Civil Procedure 15(B) applies to juvenile proceedings. (ra-2)

Plaintiffs allege that a motion to conform the pleadings to the proof is unavailable because the proof juvenile courts may take at the hearing is limited to the matters alleged in the complaint. Plaintiffs' Brief at 18, n.35. It is plausible that a minor pleading only maturity would seek to prove maturity by including testimony concerning abuse or negligent parental care. Under Ohio Rule of Civil Procedure 15(B), the court or the minor's counsel can move to conform the pleadings to the proof provided by the minor. (ra-2). Accordingly, the court would first consider the minor's maturity and, if the court made a negative finding, continue to make a finding on the minor's best interest as alleged in an amended pleading.

The Ohio Statute provides an opportunity for the minor to plead maturity or best interest. Should the minor fail to file the form appropriate to her situation, her opportunity to be heard is ensured by extensive procedural safeguards including an appointed counsel, liberal amendments, and motions to conform the pleadings to the proof. The Statute cannot be read in a vacuum as Plaintiffs urge this Court to do. The Ohio Statute complies with this Court's dictates in *Bellotti II*.

B. The Clear and Convincing Burden of Proof Is Fair and Yields a Reliable Result.

In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the Court enumerated the factors to be balanced when determining whether a standard of proof comports with due process. Those factors are: the private interests affected by the proceedings; the risk of an erroneous deprivation of such interest; and the governmental interest advanced by use of the challenged procedure.[14] *Id.* The State has formulated a

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[14] Plaintiffs argue that no consideration should be given to the State's interest because the bypass proceeding implicates a fundamental right. Plaintiffs' Brief at 20. Even the United States Court of Appeals for the Sixth Circuit recognized that the State's interest is relevant to a determination of the appropriate standard of proof. *Akron II*, 854 F.2d at 863, (A-21-22).

judicial bypass procedure which meets the *Mathews* test, is fair, and yields a reliable result. The procedure allows a minor to proceed without parental intervention if, in an *ex parte* hearing, she shows by clear and convincing evidence that she is mature or that her best interests would not be served by notifying her parents. Plaintiffs claim that the standard of proof selected by the State unduly burdens the minor's fundamental right to an abortion. Plaintiffs' Brief at 20. Contrary to Plaintiffs' position, the right at issue is the minor's right to an abortion *without parental notification*. Regardless of the outcome of the hearing, the minor can choose to have an abortion. She needs no consent but her own.

Plaintiffs argue that the ultimate harm of an erroneous decision is identical in both consent and notice statutes. Plaintiffs' Brief at 21. If a court erroneously decides, under a notice statute, that a parent should be informed of a minor's abortion decision the ultimate consequence is limited to notification. The minor can still exercise her right to choose abortion. In a consent statute, however, the minor must obtain the parent's consent for the abortion or bear the child. The outcome differs substantially. Thus, the standard of clear and convincing evidence cannot deprive the minor of her right to an abortion.

Plaintiffs argue the risk of erroneous deprivation of the mature minor's constitutional right to proceed without parental intervention is shifted to the minor by the imposition of the clear and convincing standard of proof, and any burden of proof allocated to a minor is inappropriate because a fundamental right is at stake. Plaintiffs' Brief at 20. *Bellotti II* negates these arguments. 443 U.S. at 647-648. *See infra* p.11. In an *ex parte* bypass proceeding the minor necessarily bears the risk of an erroneous decision because she is the only party involved in the proceeding. The State Legislature's decision to require clear and convincing evidence does not shift the risk.

Preponderance of the evidence by universal definition means that the facts sought to be proved are more probable

than not. *See Black's Law Dictionary* 1064 (5th ed. 1979). The Ohio Supreme Court identifies the clear and convincing evidence standard as an intermediate standard of proof that is, "more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *Cross v. Ledford,* 161 Ohio St. 469, 477, 120 N.E. 2d 118 (1954).

This Court has never addressed the standard of proof that must be used to determine maturity or best interest in the context of a judicial bypass proceeding. However, the Court's language in *Bellotti II* and *Ashcroft* supports the State's use of clear and convincing evidence as its standard of proof. The Court held that the minor must "*satisfy* the court that she is competent to make the decision independently," *Bellotti II,* 443 U.S. at 647 (emphasis added), and the court must be "persuaded." *Id.* at 648. In *Ashcroft,* this Court upheld a consent statute that required a "showing of good cause that [the minor] is mature enough to make her own decision or that requiring consent is not in her best interest." *Planned Parenthood Ass'n v. Ashcroft,* 462 U.S. at 493. It can be gleaned from the Court's discussion of other bypass procedures that a standard of proof more stringent than a preponderance of the evidence is allowed.

The Court recognizes a state may validly limit the freedom of children to choose for themselves in making important, affirmative choices with potentially serious consequences. *Bellotti II,* 443 U.S. at 635. The imposition of the clear and convincing evidence standard of proof in the bypass procedure assures the juvenile court that the minor is mature or that it is in her best interest to exercise, without parental input, her irrevocable decision.[15] Accordingly, the application

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[15] If the Court finds the clear and convincing evidence standard of proof is an undue burden on the minor's right to an abortion without parental consent, the Court can sever, under Ohio Rev. Code Ann. §1.50 (ra-1), the words "clear and convincing evidence" from the Statute. The standard the Court employs to determine severability in a state statute "is similar to that which we would apply in determining the severability of a federal statute: 'Unless it is evident that the Legislature

of a clear and convincing evidence standard of proof where a minor still retains the ultimate decision-making capacity provides adequate protection for a minor while advancing the governmental interest in a fair and reliable outcome.

C. The Statute Provides an Expedient Time-Frame.

A bypass proceeding is to be "sufficient[ly] expedit[ious] to provide an effective opportunity for an abortion to be obtained." *Bellotti II*, 443 U.S. at 644. Plaintiffs cite only two district court opinions to bolster their position that Ohio's "time frame is too long to satisfy constitutional requirements." Plaintiffs' Brief at 24. They ignore, however, this Court's approval of a bypass procedure spanning sixteen or seventeen days *plus* a sufficient, but undetermined, period of time for deliberation and decisionmaking at both the trial and appellate levels. *Ashcroft*, 462 U.S. at 491. Plaintiffs' attempt to distinguish *Planned Parenthood Ass'n v. Ashcroft* is futile. The least favorable interpretation of Ohio's time-frame, including deliberation, encompasses at a maximum, only twenty-two days. This period of time is not an undue burden on the minor's right to an abortion without parental notice for it allows a minor an "effective opportunity for an abortion to be obtained."[16] *Bellotti II*, 443 U.S. at 644.

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[15] *cont.*
would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 n.15 (1985) (citations omitted). Severing the words "clear and convincing evidence" from the Statute still leaves the section fully operative as a law.

[16] Plaintiffs rely on an affidavit from Gaujean as evidence of increased cost to a minor for a delayed abortion. Plaintiffs' Brief at 24. In an effort to bolster their contentions, Plaintiffs are reduced to reliance on a self-serving affidavit not properly before this Court. The district court heard no testimony and specifically stated with regard to the Gaujean affidavit "these exhibits were not moved into evidence and the Court does not rely on them in this facial challenge." *Akron II*, 633 F. Supp. 1123, 1141 n. 10, (A-91).

Plaintiffs confuse the role of "good cause" in *Bellotti v. Baird*, 428 U.S. 132 (1976) (*"Bellotti I"*) and *Akron I* with the role of "good cause" in the Ohio Statute by arguing that the Court should require the Ohio Statute to contain a definite standard for expediting an appeal. Plaintiffs' Brief at 25-26. *Bellotti I* discussed "good cause" as a standard for determining the maturity or best interests of the minor, not as an instruction to a court on procedural issues. 428 U.S. at 145-46. The statute in *Akron I* provided no "opportunity for case-by-case evaluations of the maturity of pregnant minors." *Akron I*, 462 U.S. at 441 (citations omitted). The Ohio Statute and Ohio Appellate Rule 14(B) (ra-1) direct appellate courts, for good cause shown, to shorten the time for appeal. Ohio Rev. Code Ann. §2505.073, (A-45). Thus, Ohio appellate courts are capable of determining good cause for further expediting a minor's appeal. The Plaintiffs' argument presupposes the Ohio courts will abuse their discretion while disregarding the legal presumption that a court will not abuse its discretion. *United States v. Allred*, 155 U.S. 591, 595 (1895).

Further, Plaintiffs fail to recognize the courts cannot delay their decision beyond the designated deadlines because of the Statute's constructive authorization provisions. Ohio Rev. Code Ann. §§2151.85(B)(1), (A-39); 2505.073, (A-45). The Ohio Legislature devised the constructive authorization provisions to prevent crowded court dockets or unforeseen problems from delaying the resolution of a minor's petition. Plaintiffs' argument relies on unbridled speculation of "clerical delay" which could mislead the physician. Plaintiffs' Brief at 28. The physician is justified in relying on the court's journal entries because a court speaks only through its journal. *See Atkinson v. Grumman Ohio Corp.*, 37 Ohio St. 3d 80, 523 N.E.2d 851 (1988), (quoting *Schenley v. Kauth*, 160 Ohio St. 109, 113 N.E.2d 625 (1953)). The Ohio Statute protects physicians, who unknowingly or in good faith, perform abortions on minors. *See* Ohio Rev. Code Ann. §2919.12(B)(1)(2), (A-46-48). Plaintiffs urge this Court to presume that the Ohio judicial system is dysfunctional in an effort to bolster their assertion that the judicial bypass procedure is not expeditious.

Plaintiffs employ a contorted interpretation of the Statute to attempt to render it unconstitutional. Plaintiffs declare that the Ohio Statute must provide some remedy should the Ohio courts fail to act within this statutory time frame but attack the *only* mechanism that can truly assure finality. Plaintiffs' Brief at 28. The constructive authorization provision assures the minor can proceed with her abortion decision without notifying her parent if the court fails to act within the statutory time-frame.

Plaintiffs' facial challenge to the time-frame provided by the Statute fails. The Ohio Statute provides an expeditious time-frame for the minor to exercise her decision by taking, at a maximum, twenty-two days, allowing the appellate court to shorten the time-frame for good cause, and providing a constructive authorization provision to guarantee a speedy decision.

D. The Statute and the Laws of Ohio Combine to Assure a Minor of the Confidential Nature of the Judicial Bypass Procedure.

Plaintiffs engage in semantic prestidigitation to give the illusion that *Bellotti II* prohibits the use of *any* identifying information on a minor's petition for judicial bypass. Plaintiffs argue the state confidentiality laws are irrelevant "because the right to anonymity is broader than the right not to have officials reveal one's identity to the public at large." Plaintiffs' Brief at 30. If Plaintiffs had consulted the decisions of this Court, rather than *Webster's New World Dictionary of the American Language*, (*See* Plaintiffs' Brief at 28-29), it would be apparent that the Court uses the terms anonymity and confidentiality interchangeably. In *Ashcroft* the Court noted:

> The plurality in *Bellotti II* also required that the alternative to parental consent must 'assure' that the resolution of this issue 'will be completed with *anonymity* . . . .' *Confidentiality* here is assured by the statutory requirement that allows the minor to use her initials on the petition.

Ashcroft, 462 U.S. at 491, n.16. (emphasis added) (citations omitted).

The Court seeks to protect the minor from public disclosure of her identity. The Statute and the ethics laws of Ohio combine to shield the minor from the eyes of the public. *See* Ohio Rev. Code Ann. §§102.03(B), (a-2); 102.99(B), (a-3); 2151.85(D), and (F), (A-41); and 2505.073(B), (A-45-46). Confidentiality is guaranteed by, not only the Statute, but also by criminal sanctions which can be imposed when an employee discloses records which are not designated to be public records. *See* Ohio Rev. Code. Ann. §§102.03(B), (a-2); and 102.99(B), (a-3). The threat of criminal prosecution is a more effective shield for protecting the minor's anonymity than the use of initials, a pseudonym, or an attached sealed envelope containing the minor's identity. Plaintiffs irrationally predict that court personnel, who face imprisonment and fines for disclosing these petitions, will allow "casual observation as they [the petitions] sit on desks and countertops in court offices open to the public." Plaintiffs' Brief at 30, n.49. Plaintiffs' outlandish predictions ignore Ohio's criminal sanctions prohibiting disclosure of non-public records and are inconsistent with the guidelines of statutory construction governing the review of a facial challenge. *See supra* p. 6-7.

Ohio has taken all precautions necessary to assure confidentiality. The Ohio Statute fulfills its promise not to disclose the minor's identity to the public or her parents. The Ohio Statute's confidentiality provisions comply with the standards enunciated in *Bellotti II* and *Ashcroft*.

III. THE OHIO STATUTE DOES NOT CREATE A PROTECTED PROPERTY INTEREST AND THEREFORE IS NOT SUBJECT TO THE SCRUTINY OF PROCEDURAL DUE PROCESS REQUIREMENTS.

Plaintiffs argue that the Ohio Statute gives minors an "entitlement to an exemption from parental notification." Plaintiffs' Brief at 34. This argument is fundamentally flawed.

In the absence of a constitutionally protected property interest, the protections of the due process clause do not apply. *See Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). To establish a property interest in a benefit, a person must have a legitimate claim of entitlement to it. This standard requires more than an abstract need or desire for the benefit and more than a unilateral expectation for it. *Id.* The question of whether a claim of entitlement exists is determined "by reference to state law." *Bishop v. Wood*, 426 U.S. 341, 344 (1976).

Plaintiffs attempt to analogize their claim of entitlement to a horse trader's license, welfare benefits, and public education. Plaintiffs' Brief at 32. Unlike these items, Plaintiffs' claim of entitlement cannot be characterized as any form of property. Furthermore, Plaintiffs fail to identify any language in the Ohio Statute which would give rise to an entitlement. *See Hewitt v. Helms*, 459 U.S. 460, 470-72 (1983) (protected interest found where statute contained "specific substantive predicates" and "explicitly mandatory language").

Far from conferring an entitlement to an exemption from parental notification, the Ohio Statute *requires* parental notification unless a minor can prove claims of maturity or best interests by clear and convincing evidence. Thus, a minor could have nothing more than a unilateral expectation in fulfilling the bypass requirements.[17] Plaintiffs have clearly misperceived the nature of an entitlement.

Even assuming Plaintiffs' claim of entitlement is legitimate, the Ohio Statute clearly satisfies the requirements of procedural due process. The fundamental requisites of due process of law are notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Publication of a statute is sufficient to put an individual on notice. *Atkins v. Parker*, 472 U.S. 115, 130

[17] If any right or entitlement is created, it would be a right of a parent to receive notification unless the bypass standards are met.

(1985); *Texaco, Inc. v. Short*, 454 U.S. 516, 531 (1982). The opportunity to be heard can usually be satisfied by an informal procedure. *See, e.g., Goss v. Lopez*, 419 U.S. 581 (1975) (entitlement to public education can be suspended after notice and a rudimentary hearing). Only in exceptional cases has this Court determined that the nature of the private interest at stake warrants a full evidentiary hearing.

Arguably, the most stringent procedures which the Court has required can be found in *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Goldberg*, the Court held that before the government could terminate welfare benefits, the recipient must be afforded a hearing with: adequate notice; opportunity for oral argument; a chance to present evidence; the right to have an attorney present; the right to have a decision based on the evidence at the hearing; the right to be provided with the reasons underlying the decision; and the right to an impartial decision-maker.[18]

The process outlined in the Ohio Statute surpasses the requirements of *Goldberg*. The Statute provides for a hearing before a judge at which counsel must be appointed for the minor if she does not have one. The Statute contemplates the presentation of any relevant evidence the minor may have to demonstrate her maturity or best interests. Although the Statute does not outline exactly how the hearing is to be conducted, it is reasonable to presume that counsel will have the opportunity to present oral arguments to the court. Moreover, as previously discussed, the Statute contains an expedited appeal process. There can be no question that such an extensive evidentiary proceeding provides a constitutionally fair hearing.

IV. OHIO'S PHYSICIAN NOTICE REQUIREMENT IS NOT AN INFORMED CONSENT STATUTE AND FURTHERS THE STATE'S LEGITIMATE

[18] *Goldberg* also provides for the right to cross-examine witnesses and the right to disclosure of evidence against the claimant. These requirements are clearly inapplicable to an *ex parte* bypass proceeding.

INTEREST IN PROTECTING A PREGNANT MINOR.

Plaintiffs contend that by requiring a physician to notify a minor's parents of her desire to have an abortion, Ohio is imposing an informed consent procedure similar to that invalidated in *Akron I*. Plaintiffs' Brief at 39-40. Plaintiffs misperceive the nature of the State's interests. Although ensuring that the minor makes an informed choice is one of the goals of direct physician contact, it is also meant to facilitate the physician's medical judgment. This objective has already been recognized as a legitimate state interest, *Matheson*, 450 U.S. at 411, and is consistent with standards of medical practice.[19] In addition, the State concluded that a parent is more likely to obtain necessary information from a physician, as opposed to an undesignated third party, to assist a parent's consultation with the minor at both pre-operative and post-operative stages. Therefore, along with ensuring that the minor makes an informed choice, the direct physician contact required by the Ohio Statute is designed to promote the health of the pregnant minor.

In contrast, the municipal ordinance struck down in *Akron I* was designed solely to ensure that an adult woman's consent to an abortion was informed and unpressured. 462 U.S. at 448. The information that needed to be imparted to secure such consent did not require a physician's knowledge and expertise. However, Ohio's legitimate interests in promoting parental consultation and assisting the physician's medical judgment would clearly not be served by delegating the notification responsibility to another individual.

Plaintiffs also contend that the district court properly relied on *Akron I* for the proposition that a physician notice requirement would increase the cost of an abortion. Plaintiffs'

[19] See Brief of Association of American Physicians and Surgeons as *Amicus Curiae* in Support of Appellant at 15 and sources cited. (Good medical care and after care for adolescents generally entails including the parents in the medical care of their minor child).

Brief at 40. If the district court did rely on *Akron I* for this proposition, it was plainly incorrect. In *Akron I*, the Court stated:

> Requiring physicians personally to discuss the abortion decision, its health risks, and consequences with each patient may in some cases add to the cost of providing abortions, *though the record here does not suggest* that ethical physicians will charge more for adhering to this typical element of the physician patient relationship.

462 U.S. at 447. (emphasis added).

Nor are Plaintiffs persuasive in making the blanket statement that the physician notification requirement here will require more than a minimal increase in the cost of abortions. Plaintiffs' Brief at 41. In this facial challenge, it is more appropriate to presume that the cost of this requirement will be subsumed as part of the typical element of the physician patient relationship, resulting in little, if any, increase in cost.[20] There is no basis to presume that the cost will be any greater than the marginal cost for viability tests described by Justice O'Connor in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3063 (O'Connor, J. concurring).

Ohio's physician notice requirement does not provide a basis for invalidating the Statute. The notice requirement permissibly furthers a legitimate state interest which has been previously recognized by this Court.

[20] It would be unprincipled for a physician to charge a patient a higher fee simply because the physician might spend additional time with the patient in order to comply with the notice requirement. See Brief of Association of American Physicians and Surgeons as *Amicus Curiae* in Support of Appellant at 21 and sources cited.

CONCLUSION

The decision of the Sixth Circuit should be reversed as it pertains to the portions of Ohio's Statute found unconstitutional.

Respectfully submitted,

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October, 1989

APPENDIX TO REPLY BRIEF FOR APPELLANT

OHIO REVISED CODE §1.50

§1.50 [Severability of Code section provisions.]

If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.

Effective Date: January 3, 1972

* * *

OHIO RULES OF APPELLATE PROCEDURE

...

RULE 14. Computation and Extension of Time

(B) Enlargement or Reduction of Time. The court for good cause shown may upon motion enlarge or reduce the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge or reduce the time for filing a notice of appeal.

...

Effective Date: July 1, 1971

* * *

OHIO RULES OF CIVIL PROCEDURE

RULE 1: Scope of rules: applicability; construction; exceptions

(A) Applicability. These rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in subdivision (C) of this rule.

(B) Construction. These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.

(C) Exceptions. These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, (2) in the appropriation of property, (3) in forcible entry and detainer, (4) in small claims matters under Chapter 1925, Revised Code, (5) in uniform reciprocal support actions, (6) in the commitment of the mentally ill, (7) in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.

Effective Date: July 1, 1975

* * *

RULE 15: Amended and Supplemental Pleadings

* * *

(B) Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary

to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Effective Date: July 1, 1970

* * *

OHIO RULE OF JUVENILE PROCEDURE

RULE 1. Scope of rules: applicability; construction; exceptions

(A) Applicability. These rules prescribe the procedure to be followed in all juvenile courts of this state in all proceedings coming within the jurisdiction of such courts, with the exceptions stated in subdivision (C).

(B) Construction. These rules shall be liberally interpreted and construed so as to effectuate the following purposes:

(1) to effect the just determination of every juvenile court proceeding by ensuring the parties a fair hearing and the recognition and enforcement of their constitutional and other legal rights;

(2) to secure simplicity and uniformity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay;

(3) to provide for the care, protection, and mental and physical development of children subject to the jurisdiction of the juvenile court, and to protect the welfare of the community; and

(4) to protect the public interest by treating children as persons in need of supervision, care and rehabilitation.

(C) **Exceptions.** These rules shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, (2) upon the trial of criminal actions, (3) upon the trial of divorce, annulment, and alimony actions, (4) in proceedings to determine the paternity of any child born out of wedlock, and (5) in the commitment of the mentally ill and mentally retarded; provided that when any statute provides for procedure by general or specific reference to the statutes governing procedure in juvenile court actions such procedure shall be in accordance with these rules.

Effective Date: July 1, 1972

* * *

MOTION

MOTION FILED
AUG 7 1989

No. 88-805

AUG 3 1989

In The

Supreme Court of the United States

October Term, 1988

STATE OF OHIO,

Appellant,

vs.

AKRON CENTER FOR REPRODUCTIVE HEALTH, et. al.,

Appellees.

On Appeal From The United States Court Of Appeals, Sixth Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE STATE OF OHIO AND BRIEF AMICUS CURIAE OF AMERICAN FAMILY ASSOCIATION, INC.

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TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE STATE OF OHIO	1
TABLE OF AUTHORITIES	5
LAW AND ARGUMENT	7
I. THE PARENTAL NOTIFICATION REQUIREMENT CONTAINED IN OHIO REVISED CODE SECTION 2919.12(B) SUFFICIENTLY PROTECTS THE DUE PROCESS RIGHTS OF MINORS	7
CONCLUSION	22
CERTIFICATE OF SERVICE	23

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE STATE OF OHIO

American Family Association, Inc. (AFA), Moving Party herein, respectfully moves this Honorable Court for an order granting leave to file the attached Brief Amicus Curiae. AFA has requested permission from Appellant by their attorney Mr. Anthony J. Celebrezze, Jr., Esq., and from Appellee, Akron Center for Reproductive Health by its Attorney, Ms. Linda Sogg, Esq.

The attached Brief supports the position of the Appellant in this case. The issue before this Court concerning the constitutionality of the parental notification requirements for minors seeking abortions will significantly affect the position of Amicus as it seeks to offer minors an alternative to abortion and to act to preserve the traditional American family.

INTEREST OF AMICUS CURIAE

The American Family Association, Inc., is a non-profit organization incorporated in 1977 under the original name of National Federation for Decency, Inc. (NFD). AFA continues to operate as a leader of citizen and church participation to promote traditional American values and apply the Biblical ethic in society. As Amicus, American Family Association, Inc., has members in all 50 states; over 520 chapters of local citizens who are active in offering individuals alternatives to abortions; and over 360,000 subscribers to its monthly newsletter, AFA Journal. Amicus also provides counseling and referral services to pregnant women who seek alternatives to abortion.

The ability of a state to protect the welfare of all its citizens, including the unborn, is vital to the

efforts of the American Family Association membership. American Family Association, Inc. seeks to promote a healthful family environment for all Americans and it recognizes the need to afford the unborn such as opportunity. The position of the American Family Association, Inc., will support the interest of the State of Ohio to protect the lives of the unborn and to preserve the traditional family unit through parental involvement in the decision-making process of pregnant minors.

Serious efforts have been under way to protect minors from the trauma associated with the abortion process. The outcome of this case is most important to the AFA constituency and its interest in continuing to inform citizens regarding the alternatives available to them when facing an unexpected pregnancy.

The parties have written comprehensive arguments and AFA will not repeat them. Rather, AFA will highlight certain concepts it wishes the Court to consider.

The ability of AFA to call for such alternatives to abortion has been fundamentally affected by the court's ruling. Amicus and the citizens they represent would be severely harmed by affirming the Sixth Circuit finding with respect to the constitutionality of the statute regarding parental notification.

Therefore, AFA respectfully requests this Honorable Court to grant leave to file the attached Brief Amicus Curiae in this important case and to reverse the decisions of the court below.

Respectfully submitted,

Peggy M. Coleman
Attorney for AFA

TABLE OF AUTHORITIES

Cases	Page
Akron Center for Reproductive Health v Slaby, 854 F.2d 852 (6th Cir. 1988)	7, 9
Bellotti v Baird, 443 U.S. 622 (1979)	15
City of Akron v Akron Center for Reproductive Health, 462 U.S. 416 (1983)	15
Globe Newspaper Co. v Superior Court, 457 U.S. 596 (1982) . . .	13
Goss v Lopez, 419 U.S. 565 (1975).	14
Harris v McRae, 448 U.S. 297 (1980)	8
In re Gault, 387 U.S. 1 (1967) . .	15
Lemmon v Beeman, 45 Ohio St. 505, 15 N.E. 476 (1888)	11
Meyer v Nebraska, 262 U.S. 390 (1923)	13
New York v Ferber, 458 U.S. 747 (1982)	14
Planned Parenthood of Central Missouri v Danforth, 428 U.S. 52 (1976)	9, 14 17
Prince v Massachusetts, 321 U.S. 158 (1944)	14

Roe v Wade, 410 U.S. 113 (1973). 8

Tinker v Des Moines School District, 393 U.S. 303 (1969). 15

Webster v Reproductive Health Services, ____ U.S. ____, 57 U.S.L.W. 5023 (1989) . . . 9

Wisconsin v Yoder, 406 U.S. 205 (1972) 13, 19

Statutes

O.R.C. §2919.12 (Page 1986) . . 7

O.R.C. §2317.54(c) (Page Supp. 1988) 12

O.R.C. §2907.05 (Page 1986) . . 15

O.R.C. §2907.31 (Page 1986) . . 15

O.R.C. §4301.22 (Page 1986) . . 18

O.R.C. §3103.03 (Page 1986) . . 18

LAW AND ARGUMENT

I. THE PARENTAL NOTIFICATION REQUIREMENT CONTAINED IN OHIO REVISED CODE SECTION 2919.12(B) SUFFICIENTLY PROTECTS THE DUE PROCESS RIGHTS OF MINORS.

The Sixth Circuit found that requiring notification be given by the attending physician placed an undue burden on the minor's right to seek an abortion. Akron Center for Reproductive Health v Slaby, 854 F.2d 852, 862 (6th Cir. 1988). Further the court found the judicial by-pass provisions of pleading, standard of proof, confidentiality and expediency were unduly burdensome. 854 F.2d at 869.

A. The Parental Notification Statute Does Not Require A By-Pass Provision.

The Ohio legislature has determined that in order to protect the health and well-being of minor females parental

notification of a decision to procure an abortion is necessary. R.C. §2919.12 (Page 1986). The minor is not required to obtain permission from the parent, but she must merely inform the parent or guardian of her decision.

The Sixth Circuit proceeded in its analysis under two flawed assumptions: first that a woman has a right to an abortion and second the interest of the state and a minor are roughly commensurate with those of the state and an adult woman during the abortion decision-making process.

The Court in Roe v Wade, 410 U.S. 113, 154 (1973), found that a pregnant woman had a certain privacy right, "but that this right is not unqualified and must be considered against important State interests in regulation." The Court has found that the State's interests have outweighed the pregnant

woman's privacy interests, even early in the term, in the use of public monies for abortions, Harris v McRae, 448 U.S. 297 (1980); in the requirement that the abortion be based upon "informed consent," Planned Parenthood of Central Missouri v Danforth, 428 U.S. 52 (1976), and in the prohibition of the use of public facilities or public employees to perform abortions, Webster v Reproductive Health Services, ____ U.S. ____ 57 U.S.L.W. 5023 (1989). It is abundantly clear that the privacy right which has been attached to a woman's decision to abort a child is limited by certain State interests. The Sixth Circuit's analysis which was entrenched in notions of absolute rights is misfounded.

The court then leaps from a recognition "that a woman possesses a fundamental constitutional right to seek an abortion" to the recognition "that

under certain circumstances, parental intervention is appropriate when the abortion decision is made by a minor." 854 F.2d at 857. In its ensuing discussion the court analyzes cases involving parental consent and parental notification and concludes that the Constitution requires a judicial by-pass provision in any notification scheme.

While there has appeared to be a lack of continuity or cohesiveness in the decisions addressing abortion regulation, two underlying principles emerge which may be applicable to the present analysis. First, the State may treat the abortion procedure as it does any other medically similar procedures. Second, the State should be able to treat minors differently from adults who seek an abortion.

Applying the first premise and based upon the interests of the state to

regulate medical procedures, the State may impose certain restrictions and notice requirements on medical practitioners. The State requires that before a medical professional removes a child's tonsils or her appendix she must obtain permission from the parent or guardian. If a child wishes to have her ears pierced the practitioner must obtain permission from the child's parents or guardian. To suggest that the health interests of the State are less in the case of a child undergoing an abortion than they are when she has her ears pierced is to acquiesce to the absurd.

These limitations are, in part based upon long-recognized contract law principles. In Ohio, a minor may void a contract upon reaching the age of majority. Lemmon v Beeman, 45 Ohio St. 505, 15 N.E. 476, 477 (1888). ("an infant may, as a general rule, disaffirm

any contract into which he has entered; but, until he does so, the contract may be said to subsist, capable of being made absolute by affirmance, or void by disaffirmance, on his arriving at age, in other words, infancy confers a privilege rather than imposes a disability.) The contract a minor makes with an abortionist is voidable upon reaching majority. The child cannot technically, consent to the medical procedures so as to release the abortionist from claims of battery. As a result of the misapplication of long standing legal principles concerning the status of minors in the law, functional "rights" have been specifically created to permit children the opportunity to procure an abortion without parental notification or consent.

In obtaining informed consent prior to surgical or medical procedures, Ohio

Revised Code §2317,54 (c) (Page 1988 Supp.) which provides that the consent be "signed by the patient for whom the procedure is to be performed, or, if the patient for any reason including, but not limited to, competence, infancy, or the fact that, at the latest time consent is needed, the patient is under the influence of alcohol, hallucinogens, or drugs, lacks legal capacity to consent, by a person who has legal authority to consent on behalf of such patient in such circumstances." The absence of parental notification directly contravenes the statutory scheme which requires informed consent prior to medical or surgical action.

Second, this Court has long recognized that children and adults may be treated differently under the law and that there is a different protection under the Constitution for children than

for adults. In the present case, there are several recognized rights which must be considered. The first is the right of the parents to "establish a home and bring up children". Meyer v Nebraska, 262 U.S. 390, 399 (1923). The second interest is that of the State in "safeguarding the physical and psychological well-being of a minor." Globe Newspaper Co. v Superior Court, 457 U.S. 596 (1982). The State may require a child to receive educational instruction, Wisconsin v Yoder, 406 U.S. 205 (1972); it may prohibit children from being used in production of sexually explicit material, New York v Ferber, 458 U.S. 747 (1982); and it may limit the duration and type of employment in which a child may engage, Prince v Massachusetts, 321 U.S. 158 (1944). In his dissent in Danforth Justice Stevens noted,

> the State's interest in the welfare of its young citizens justifies a variety of protective measures. Because we may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel when he pleases, or even attend the exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman's already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible.

428 U.S. at 102.

Finally, this Court has recognized that minors are entitled to certain protections afforded adults under the Constitution. Goss v Lopez, 419 U.S. 565 (1975); In re Gault, 387 U.S. 1 (1967); and Tinker v Des Moines School District, 393 U.S. 303 (1969). These

constitutional rights are limited by virtue of the minority.

Without precedent this Court has acknowledged a distinction between "mature" minors and "immature" minors. Bellotti v Baird, 443 U.S. 622 (1979); City of Akron v Akron Center For Reproductive Health, 462 U.S. 416 (1983). This distinction, however, is not upheld elsewhere in the law. The Ohio legislature has made the sale of alcoholic beverages to minors a crime; R.C. §4301.22; the distribution of obscene material harmful to minors a crime, R.C. §2907.31; and sexual intercourse between an adult and a minor female under the age of fifteen is a crime, R.C. §2907.05.

The courts have not engaged in an analysis based upon the rights of a "mature" versus an "immature" minor in these areas. The debate concerning a

"mature" versus an "immature" minor in these circumstances has been properly conducted by the Ohio legislature when it fixed the age of majority. The same is true with respect to the requirement of parental notification.

The legislature found, as evidenced by the statute, that those women under the age of eighteen are immature for the purpose of this statute and must be afforded greater protection. To judicially carve out a subset from the class of minors is an act of usurpation of legislative right and authority.

The Court in reviewing the parental notification provision must balance the interests of the State in the child's welfare and the interest of parents in the upbringing of the child against the child's privacy interests in obtaining an abortion. Mr. Justice Stevens, in his dissent, provided an eloquent analysis of

the role parents play in a minor's decision making process in Planned Parenthood of Central Missouri v Danforth, 428 U.S. 52 (1986).

> If there is no parental-consent requirement, many minors will submit to the abortion procedure without ever informing their parents. An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and indeed, for some indispensable. It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will exercise his or her veto arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster the welfare by helping a

> pregnant distressed child to make and to implement a correct decision.

428 U.S. at 103-04.

This same reasoning is applicable to the present parental notification provision.

The parents are under a legal obligation to care for the child and may be otherwise legally responsible for the child. In Ohio the father is required to "support ... his minor children out of his property or by his labor." R.C. 3103.03. In addition, the statute states that "the parental duty of support to children shall continue so long as the child continuously attends on a full-time basis any recognized and accredited high school, even when such child has attained the age of majority." Id. To require a parent to support a child and have legal responsibilities for the child while preventing or facilitating the prevention of a parent's role in the child's

decision to procure an abortion is inconsistent if not irrational.

By requiring the state to implement a judicial by-pass provision which is effectuated without real discussion or counsel with the child, the Sixth Circuit would dismiss the parent's interests in child rearing and family preservation as insignificant.

In essence, by requiring the judicial by-pass provision, the Court would grant to the judge more authority and implicitly a greater interest in the welfare of the child than the parents. The practical effect of a judicial by-pass provision is to usurp the authority of the parents and to minimize the value of the family unit. The interest of the State in this notification procedure should involve the courts only if there is evidence of abuse or neglect on the part of the parents.

This is in essence, the same standard that has long been recognized by the courts for intervention by state into the family unit.

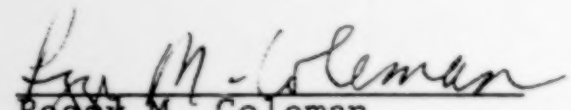
In Yoder, 406 U.S. 205, 232 (1972), this Court stated that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." It is this tradition and function of parenting which is being assaulted by the imposition of a judicial by-pass requirement.

CONCLUSION

Parental notification is a Constitutionally sound regulation the State of Ohio may implement to protect minors and to preserve the integrity of the family unit.

For these reasons, in addition to those urged by Appellant herein, the decision below should be corrected and reversed.

Respectfully submitted,
American Family
Association, Inc.



Peggy M. Coleman
Legal Counsel
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief Amicus Curiae of American Family Association, Inc., have been mailed this third day of August, 1989, to the following counsel of record:

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All parties required to be served have been served.

Peggy M. Coleman
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MOTION

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AUG 16 1989

No. 88-790, No. 88-805, No. 88-1125

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

No. 88-790

TURNOCK v. RAGSDALE

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88-805

OHIO v. AKRON CENTER FOR
REPRODUCTIVE HEALTH

ON APPEAL TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

No. 88-1125

HODGSON v. ILLINOIS

ON APPEAL TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

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CONTENTS

Interest of Counsel.....1

Summary of Argument.....1

Argument.....2

THE UNBORN HAVE A CONSTITUTIONAL RIGHT TO BE ESPECIALLY REPRESENTED BY COUNSEL TO PROVE THEIR LIVES ARE PROTECTED BY THE U.S. CONSTITUTION...2

1.
THIS COURT EFFECTED AND MAINTAINS THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW COUNSEL TO REPRESENT THE UNBORN AND DEFEND THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.....2

2.
THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW PRIOR NOTICE OF THE CONSTITUTIONAL STANDARDS, THE BURDENS, OR THE EVIDENCE WHICH IT USED TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION...5

3.
THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY USING A SECRET EVIDENTIARY PROCESS TO FIND EVIDENCE TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION.....9

4.
THIS COURT EFFECTED AND MAINTAINS THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW ITS EVIDENCE, WHICH IT USED TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION, TO BE CONFRONTED AND CROSS-EXAMINED....11

5.
THIS COURT EFFECTED AND MAINTAINS THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW EVIDENCE TO BE PRESENTED ON BEHALF OF THE UNBORN TO ESTABLISH THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.....13

Issues Raised by Counsel for the Unborn, Not Raised by the Parties.....17

Conclusion.....18

TABLE OF AUTHORITIES

Cases:

Dred Scott v. Sanford, 19 How. 393.....6

Goldberg v. Kelly, 397 U.S. 254.....4

Imbler v. Pachtman, 424 U.S. 409 5

In Re Gault, 387 U.S. 1.....4

United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals (1951).....5,16-17

Books:

4 Collected Works of Abraham Lincoln (Basler ed. 1953).....6

Briefs Filed In This Court:

Amicus Curiae Brief by the Legal Defense Fund for Unborn Children, filed in this case.....17

Petition for Rehearing, Doe v. Bolton, 410 U.S. 179 (1973).....2,8,10,12,15

U.S. Constitution:

Sixth Amendment-"Assistance of Counsel"...4

Fifth Amendment-"Due Process" 4

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

The Court is moved to allow Alan Ernest to represent the victims being killed by Roe v. Wade, 410 U.S. 113, as counsel or guardian ad litem, for the purpose of defending their right to life under the U.S. Constitution.

INTEREST OF COUNSEL

Alan Ernest is a lawyer in the District of Columbia and a member of the bar of this Court. His purpose is to prove that the guarantee of life to "any person," made in the U.S. Constitution, does include the unborn.

This is effectively a motion to allow retained counsel since there will be no expense to this Court, or to the taxpayers.

SUMMARY OF ARGUMENT

The unborn have a constitutional right to be especially represented by counsel to prove that their lives are specifically guaranteed by the U.S. Constitution.

Argument

THE UNBORN HAVE A CONSTITUTIONAL RIGHT TO BE ESPECIALLY REPRESENTED BY COUNSEL TO PROVE THEIR LIVES ARE PROTECTED BY THE U.S. CONSTITUTION.

1.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW COUNSEL TO REPRESENT THE UNBORN AND DEFEND THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.

Counsel did not especially represent the unborn in the U.S. District Court, or at any stage in Roe v. Wade. An original party objected that the unborn should be represented by counsel in this Court:

> (T)he Court should have every benefit of a complete record and the representation of a guardian ad litem for that fetal entity and for its natural right to develop to birth.[1]

But this Court refused to allow counsel to represent the unborn and defend their right to life under the U.S. Constitution. Thus the killings commenced.

And the Supreme Court has maintained the killings by steadfastly refusing to

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1. Petition for Rehearing 5, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

allow counsel to represent the unborn, and defend their right to life under the U.S. Constitution.[2]

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2. The Court has refused to allow counsel for the unborn in all its abortion cases. Some are: Colautti v. Franklin, 439 U.S. 379, motion to allow counsel for the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel for the unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel for the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel for the unborn denied, 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel for the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel for the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel for the unborn denied 445 U.S. 959; Simopoulos v. Virginia, 462 U.S. 506, motion to allow counsel for the unborn denied 458 U.S. 1104; Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, motion to allow counsel for the unborn denied 458 U.S. 1104; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel for the unborn denied 458 U.S. 1104; Diamond v. Charles, 90 L Ed 2d 48 (1986), motion to allow counsel for the unborn denied 87 L Ed 2d 704; Thornburgh v. American College of Obstetricians, 90 L Ed 2d 779 (1986), motion to allow counsel for the unborn denied 87 L Ed 2d 702; Hartigan v. Zbaraz, 98 L Ed 2d (1988), motion to allow counsel to for the unborn denied 93 L Ed 2d 697, and Webster v. Reproductive Health Services, ___ U.S. ___ (1989).

The unborn have a constitutional right to be represented by counsel in this case to defend their right to life under the U.S. Constitution.[3] Judges who willfully

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3. Even in civil proceedings, where crucial deprivations are threatened, such as loss of welfare, due process guarantees (1) prior notice of the factual and legal bases; (2) the right to be represented by counsel; (3) the right to confront and cross-examine adverse evidence; (4) the right to present evidence. Goldberg v. Kelly, 397 U.S. 254, 268-271 (1970). See also, In Re Gault, 387 U.S. 1 (1967).

Could it be possible that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S.Constitution so that she could be killed with impunity from criminal laws? This is preposterous.

The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can it permit any court to condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing the lives of all Jews are not protected by the U.S. Constitution, and it is "liberty" to kill all Jews with impunity from criminal laws.

Any victim is entitled to all these procedural protections before any court can decree that the victim's life is not protected by the Constitution, and the victim can be killed with impunity from criminal statutes. The rule for one is the rule for all; these are the sacred truth-seeking procedures which protect the lives of all Americans.

deny this right are guilty of crime.[4] This denial makes Roe v. Wade void.

2.

THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW PRIOR NOTICE OF THE CONSTITUTIONAL STANDARDS, THE BURDENS OF PROOF, OR THE EVIDENCE WHICH IT USED TO INFER THAT THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION.

The District Court in Roe v. Wade did not even look to see if the lives of the unborn were protected by the Constitution. This question was argued for the first time after the case reached this Court. Since this Court had never previously excluded anyone from the protection of the U.S. Constitution so they could be killed with impunity from criminal statutes, the parties had no prior notice of the factual and legal bases for such an exclusion.

Moreover in the aftermath of Dred Scott v. Sanford, legitimate public

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4. "Even judges ... could be punished criminally for willful deprivations of constitutional rights." Imbler v. Pachtman, 424 U.S. 409 (1976).

expectation rested on the assurance that this Court would never again attempt another exception to the universal terms "any person."[5]

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5. This Court's decision in Dred Scott v. Sanford appears to be the only precedent in American history in which this Court has implied an exception to the universal terms "any person" in the Fifth or Fourteenth Amendments. The Court there ruled that the universal words "any person" did not include Negroes, there was a constitutional right to own a slave, and Congress could not prohibit slavery in the free territories. This decision triggered a civil war. Candidate Abraham Lincoln vowed he would not obey Dred Scott. Opponents said their states would withdraw from the Union rather than be deprived of their assumed constitutional right to own slaves and take them to the free territories. 4 Collected Works of Abraham Lincoln 267 (1953). But President Abraham Lincoln responded that if he were bound by Dred Scott, "the people will have ceased to be their own rulers." Id., at 268. Thus the war commenced.

A purpose of the Fourteenth Amendment was to overrule Dred Scott, and place it beyond the power of judges to ever again produce convulsions by implying an exception the universal words "any person." For over a century legitimate public expectation rested on the assurance that this Court would never again attempt an exception to the universal terms "any person."

But without any prior notice, this Court once again, in the precise manner of Dred Scott, attempted to imply an exception to the universal words "any person." In Roe v. Wade, this Court thus combined both total surprise and violent defiance of the long standing legitimate public expectation that never again would this Court violate the universal words "any person."

In particular, this Court gave the parties in Roe v. Wade no prior notice of the constitutional standards, the burdens of proof, or the evidence, which the Court used to infer that the universal words "any person," as used in the Fourteenth Amendment, did not include the unborn.

The first time the parties had notice was when Roe v. Wade was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn:

> [N]ot only did the Court set a new constitutional standard, but at the same moment the Court applied the standard without giving the Appellees notice or opportunity to present evidence with respect to the point in gestation at which such standards, if they be correct as a matter of law in the first place, should be applied. "Viability", "meaningful life" or existence, "fetal life": all presumably have medical meaning which should be subject to medical testimony before a decision of constitutional import becomes solidified in concrete. These concepts are not even necessarily the appropriate ones.[6]

But this Court refused to allow the original parties to have prior notice. Thus the killings commenced.

And this Court has maintained the killings despite repeated objections that the unborn had no prior notice in Roe v. Wade of the factual and legal basis needed to defend the unborn's right to life under the U.S. Constitution.[7]

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6. Petition for Rehearing 6, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973). (emphasis added).

7. See cases in note 2, supra.

The unborn have a constitutional right to prior notice of all the factual and legal bases before they can be excluded from the protection of the Constitution so they can be killed with impunity from criminal statutes.[8] Judges who willfully deny this right are guilty of crime.[9] This denial makes Roe v. Wade void.

3.

THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY USING A SECRET EVIDENTIARY PROCESS TO FIND EVIDENCE TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION.

This Court used some secret evidentiary process, not open to the parties, to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. The Court conducted these evidentiary proceedings in its back rooms; the parties were not allowed to be present; no public record was made of these proceedings. The purpose of these

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8. See note 3, supra.

9. See note 4, supra.

proceedings was to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. An original party objected to these secret judicial proceedings:

> The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation for the Court's opinion ... of constitutional stages of fetal growth.[10]

But the Court permitted the killings to commence despite this objection to its secret evidentiary proceedings.

And this Court has maintained the killings despite repeated objections that it used secret evidentiary proceeding in Roe v. Wade.[11]

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10. Petition for Rehearing 4, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

11. See cases in note 2, supra.

The unborn have a constitutional right not to be excluded from the protection of the U.S. Constitution by secret evidentiary proceedings.[12] Judges who willfully deny this right are guilty of crime.[13] This denial makes Roe v. Wade void.

4.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW ITS EVIDENCE, WHICH IT USED TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION, TO BE CONFRONTED AND CROSS-EXAMINED.

Since the Court used a secret process, the original parties had not seen all the evidence which the Court used to infer that the lives of the unborn are not protected by the U.S. Constitution. An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the U.S. Constitution:

> The Court has taken judicial notice of innumerable facts and factors, some

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12. See note 3, supra.

13. See note 4, supra.

> which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation of the Court's opinion ... of constitutional stages of fetal growth.[14]

But the Supreme Court refused to allow the original parties to cross-examine its evidence in Roe v. Wade, which it used to infer that the lives of the unborn were not protected by the U.S. Constitution. Thus the killings commenced.

And this Court has maintained the killings by steadfastly refusing to allow its evidence, which it used to infer that the lives of the unborn were not protected by the U.S. Constitution, to be confronted and cross-examined.[15]

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14. Petition for Rehearing 4, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973) (emphasis added).

15. See cases in note 2, supra.

The unborn have a constitutional right to confront and cross-examine the evidence which this Court used to infer that their lives are not protected by the U.S. Constitution.[16] Judges who willfully deny this right are guilty of crime.[17] This denial makes Roe v. Wade void.

5.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW EVIDENCE TO BE PRESENTED ON BEHALF OF THE UNBORN TO ESTABLISH THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.

In Roe v. Wade, the Court invented new constitutional standards on the protection of life by the U.S. Constitution, which the parties did not see until after Roe v. Wade was decided. The parties never had opportunity to present evidence under these new standards. An original party asked permission to present evidence under the new constitutional standards, which it had not seen before, to show that the lives of

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16. See note 3, supra.

17. See note 4, supra.

the unborn are protected by the

Constitution:

> We are dealing here with a procedure long considered outlawed and which has suddenly become become legal.
> ....
> What the Court has done is to compel the State to condone the killings of prenatal infants and even to encourage it by loose controls.
> ....
> The interest in protecting the concept of the sacredness of human life and the natural rights which follow its emergence, underlies the interest in protecting fetal life and is the root of the State's expressed desire to curb killing.
> ....
> The Court has selected a point in time at which states may protect fetal life, without any record of facts upon which to base the conclusion that only at "viability," as that term is defined by the Court, do the people of a state have authority to demand caution before a prenatal infant is destroyed.
> ....
> Appellees have had no opportunity to show by evidence in a traditional judicial trial setting at what gestational stage the separate life of the fetus is "meaningful" medically; in addition, the Court overlooked the significance of Georgia's legal recognition of meaningful human life as found in case law and statute.
> ....
> With no opportunity for Appellees to demonstrate the factual basis, in terms of current medical science, that its interest attaches at a particular

point in the natural development of a human fetus, the Court has seized upon the convenient point of "viability" and crystallized constitutional command which bars State action.

....

In the medical concept of "life," with its current body of technological knowledge, including such advances as fetal electrocardiography and fetal electroencephalography, legal "life" should not be cemented at an event in a judicial conclusion which does not have the benefit of medical evidence.

....

At any rate, Appellees should have an opportunity to present evidence and testimony to support the State's claim of medically and scientifically sound interest in requiring a cautious approach to the extinguishment of fetal life.[18]

But the Court refused to allow the original parties to present evidence to show that the lives of the unborn were protected by the U.S. Constitution. Thus the killings commenced.

And this Court has maintained the killings by steadfastly refusing to allow evidence to be presented on behalf of the

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18. Petition for Rehearing 3,4,5,6,8, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

unborn to prove that their lives are protected by the Constitution.[19]

The unborn have a constitutional right to present evidence in this case to prove that their lives are protected by the U.S. Constitution.[20] Judges who willfully deny this right are guilty of crime.[21] This denial makes Roe v. Wade void.

The procedures used by the Court to effect and maintain the Roe v. Wade killings are essentially the same procedures cited by the Nuremberg Court as part of the evidence to convict the Nazi judges of complicity in extermination and murder.[22]

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19. See cases in note 2, supra.

20. See note 3, supra.

21. See note 4, supra.

22. "In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them.... They were ... denied the right of counsel of their own choice....(T)he accused learned only a few moments before trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no

II.
ISSUES RAISED BY COUNSEL NOT RAISED BY THE PARTIES

The parties have not raised the question of whether this Court must overrule Roe v. Wade because the lives of the unborn are protected by the U.S. Constitution.

The unborn have a right to be especially represented by counsel, to present evidence and arguments not presented by the parties, to show that the universal and unalienable guarantee of life to "any person," made in the U.S. Constitution, does include the unborn.[23]

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public record was allowed to be made of them." United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1046-1047 (1951).

"Such a mock trial is not a judicial proceeding but a murder." Id., at 1164.

"The dagger of the assassin was concealed beneath the robe of the jurist." Id. at 985.

23. This evidence and arguments are presented in the amicus curiae brief by the Legal Defense For Unborn Children, and incorporated herein by reference.

CONCLUSION

The photograph on the last page shows a child killed by a second stage abortion under Roe v. Wade. These children are entitled to have assistance of counsel to prove that the universal guarantee of life to "any person," made by the U.S. Constitution, includes the unborn.

When judges use the above procedures to defy the guarantee of life to "any person" in order to exclude millions of victims from the protection of the U.S. Constitution, so they can be killed with impunity from criminal statutes, it cannot be pretended it is any longer the government of the United States, or any government of Constitution and laws. "Such a mock trial is not a judicial proceeding but a murder."

This Court, and all the lower judges who have upheld this Court's claim of power to use such procedures to condemn millions

to death, are accused of premeditated capital mass murder.[24] "The dagger of the assassin was concealed beneath the robes of the jurist."

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24. U.S. DISTRICT JUDGES: Albert V. Bryan, Jr.; Emmett R. Cox; Edward T. Gignoux; Harold H. Greene; J. Thomas Greene; William B. Hand; Joseph C. Howard; Martin F. Loughlin; Robert Earl Maxwell; Louis F. Oberdorfer; Raymond J. Pettine; Aubrey E. Robinson, Jr.; John J. Sirica; James R. Spencer; James C. Turk; D. Dortch Warriner; Don J. Young. U.S. CIRCUIT JUDGES: D.C. Circuit- David L. Bazelon; Carl McGowan; Roger Robb; George E. MacKinnon; Spotswood Robinson III; J. Skelly Wright; Edward A. Tamm; Malcolm R. Wilkey. First Circuit- Levin H. Campbell; Frank M. Coffin; Hugh H. Bownes; Stephen G. Breyer. Fourth Circuit- Harrison L. Winter; Donald S. Russell; H. Emory Widener, Jr.; Kenneth K. Hall; James D. Phillips, Jr.; Fracnis D. Murnaghan, Jr.; James M. Sprouse; Sam J. Ervin, II; Robert F. Chapman. Eleventh Circuit- John C. Godbold; Paul H. Roney; Gerald B. Tjoflat; James C. Hill; Peter T. Fay; Robert S. Vance; Phyllis A. Kravitch; Frank M. Johnson, Jr.; Albert J. Henderson, Jr.; Joseph W. Hatchett; R. Lanier Anderson, III; Thomas A. Clark. AND the judges in Roe v. Wade and Doe v. Bolton who decreed a "liberty" to kill the unborn without any investigation to see if their lives were protected by the Constitution: Circuit Judges Morgan and Goldberg; District Judges Smith, Henderson, Hughes and Taylor.

Alan Ernest
Counsel for Movant

MOTION

MOTION FILED
AUG 16 1989

(7) (7) (6)

No. 88-790, No. 88-805, No. 88-1125

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

No. 88-790

TURNOCK v. RAGSDALE

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88-805

OHIO v. AKRON CENTER FOR
REPRODUCTIVE HEALTH

ON APPEAL TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

No. 88-1125

HODGSON v. ILLINOIS

ON APPEAL TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE WITH BRIEF BY LEGAL DEFENSE FOR UNBORN CHILDREN

ALAN ERNEST
COUNSEL FOR AMICUS

P.O. BOX 2963
RESTON, VA. 22090
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MOTION FOR LEAVE TO FILE

Interest of Amicus

The brief, which does not support any party, defends the constitutional right to life of the unborn, which the parties have not done.

Argument

The amicus proves that the the Fifth and Fourteenth Amendments' guarantee of life to "any person" does include the unborn. Thus this Court must not only overrule Roe v. Wade, 410 U.S. 113, it must rule that the States have a duty to protect unborn life. The parties have not raised this issue; it disposes of all issues in this case.

The universal guarantee of life to "any person" is the most important right in the Constitution, and the lives of millions of children depend on their being permitted to present all relevant evidence to prove their unalienable right to life.

Alan Ernest, Counsel

Contents

Interest of Amicus Curiae.....1

Summary of Argument.....1

Argument

I.

THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

1. THE LETTER OF THE LAW (THE GUARANTEE OF LIFE TO "ANY PERSON," THE TWO MOST IMPORTANT WORDS EVER ENACTED INTO LAW) ON ITS FACE INCLUDES THE UNBORN.....1

2. THE MODIFIER "ANY" INVOKES A VIRTUALLY IRREBUTTABLE PRESUMPTION THAT THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.....4

3. THE SPIRIT OF THE LAW, THE PROMISE THAT "ALL MEN ARE CREATED EQUAL," SHOWS THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.....5

4. HISTORY SHOWS THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.....6

II.

ROE v. WADE IS VOID BECAUSE IT CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" AND CONDEMNED TO DEATH MILLIONS OF VICTIMS WHOM THE CONSTITUTION ENDEAVORS TO PRESERVE.

1. ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT DECREED KILLINGS TO BE "LIBERTY" WHICH THE PEOPLE HAD DEFINED TO BE "MURDER." THE COURT DECREED "MASS MURDER IS LIBERTY." 10

2. ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT FABRICATED EVIDENCE TO FALSELY IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN.....23

3. ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT DEFIED THE RULINGS OF JOHN MARSHALL AND USED A "GUILTY UNTIL PROVEN INNOCENT" BURDEN OF PROOF TO IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN...39

4. ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT USED "IRON CURTAIN" PROCEDURES TO IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN; IT USED THESE PROCEDURES TO MAINTAIN ITS ROE v. WADE KILLINGS...47

5. DUE PROCESS OF LAW HAS COMPELLED THE U.S. SUPREME COURT TO CONFESS IN COURT THAT IT IS GUILTY OF MASS MURDER, AND TO ADMIT THAT THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.....54

Conclusion.....64

TABLE OF AUTHORITIES

Cases:

Baxter v. Palmigiano, 425 U.S. 308.....56

Clarke v. State, 117 Ala. 1 13,14

Cohens v. Virginia, 6 Wheat. 264 41,54

Craig v. Missouri, 3 Pet. 410 22

Dartmouth College v. Woodward,
4 Wheat. 518.....40

Dred Scott v. Sandford, 19 How. 393.....6-8

Ernest v. U.S. Attorney, etc., cert.
denied 89 L Ed 2d 721 (1986).....21

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Gulf, Colo. and S. Fe RR v. Ellis,
165 U.S. 150.....5

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26 App. D.C. 382.....13

Imbler v. Pachtman, 424 U.S. 409.....51

In Re Gault, 387 U.S. 1.....51

Lamb v. State, 67 Md. 524 24

Marbury v. Madison, 1 Cranch 137.....57

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1 Wheat. 305 41

McCulloch v. Maryland, 4 Wheat. 316.....55

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Passenger Cases, 7 How. 282.....58

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Regina v. West, 2 C & K 784.....12-13

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Santa Clara v. So. Pac. RR,
118 U.S. 394.....39

Smith v. State, 33 Me. 48.....30

State v. Anderson, 343 A. 2d 505 15

State v. Reed, 45 Ark. 333 24

State v. Slagle, 83 N.C. 544 24

Sturges v. Crowninshield,
4 Wheat. 122.....40

United States v. Altstoetter, 3 Trials
of War Criminals before the Nuernberg
Military Tribunals (1951).....20,50,62

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(1860).....13

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of Midwifery (1808).....26,27

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of Obstetrics (1860).....27,34,35

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McCormick, The Law of Evidence (1972)....56

Model Penal Code.....62

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(2d ed. 1969).....14,57,62

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Obstetric Medicine (1856).....27

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Misdemeanors (4th ed. 1865) 13

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in America (1860).....31

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(Penrose Am. ed. 6th ed. 1866).....11,14

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Midwifery (4th Am. ed. 1854).....27

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Homicide in the United States (1855).....14

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Medical Jurisprudence (1860).....24

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Writings of Thomas Jefferson
(A. Bergh ed. 1907).....12

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Fund for Unborn Children, filed in Akron
v. Akron Center for Reproductive Health,
462 U.S. 416 (1983).....60

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The Need for a Life Protective Amendment,
63 Cal. L. Rev. 1250 (1975).....3,38

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Amendments on Abortion, Before the
Subcommittee on Civil and Constitutional
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House of Representatives, 94th Cong., 2d
Sess., Ser. 46, Part 1 (1976).....17

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Complication, The Philadelphia Inquirer,
August 2, 1981 17

Joynes, Va. Med. J. (1856).....33

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Transactions of the American Medical Association (1860).....34

U.S. Constitution and Statutes:

Fourteenth Amendment- "Any Person".....1-9

Fifth Amendment- "Any Person".....1-9

Fifth Amendment- Due Process 47-53

18 U.S.C. § 242 64

Interest of Amicus

The amicus defends the right to life of the unborn, which the parties have not done.

Summary of Argument

The unalienable guarantee of life to "any person," made in the Fifth and Fourteenth Amendments, includes the unborn.

Argument

I.

THE GUARANTEE OF LIFE TO "ANY PERSON," MADE BY THE CONSTITUTION, INCLUDES THE UNBORN.

1. THE LETTER OF THE LAW (THE GUARANTEE OF LIFE TO "ANY PERSON," THE TWO MOST IMPORTANT WORDS EVER ENACTED INTO LAW) ON ITS FACE INCLUDES THE UNBORN.

The 5th and 14th Amendments guarantee that not "any person" can be deprived of "life ... without due process of law." The words "any person" are universal, admit of no exceptions for anyone, make no distinction between born and unborn life, and thus on their face include the unborn, the same as everyone else. The obvious purpose of guaranteeing life universally to "any person" was to forbid making exceptions so some persons could be exterminated.

The Court admitted that if the word "person" included the unborn, then Roe v. Wade "collapses," because the unborn's lives would be "guaranteed" by the Constitution.[1] In ruling "the word 'person' ... does not include the unborn,"[2] the Court hit the Constitution head on, did what is expressly forbidden, and directly defied the letter of the law of its most important guarantee.

The words "any person" are the two most important words ever written into law. The guarantee of life to "any person" is the single most important guarantee because it protects the lives of everybody from government sanctioned extermination, as happened in Nazi Germany.

And the words "any person" give legal body to the spirit that "all men are created equal" and endowed with an "unalienable" right to life. The words "any person" exactly summarize what America stands for,

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1. Roe v. Wade, 410 U.S. at 156-157.
2. Roe v. Wade, 410 U.S. at 158.

its unique contribution to civilization. As Abraham Lincoln said, what made America great was the promise "not alone to the people of this country, but hope to the world for all future time ... that ALL should have an equal chance."

The words "any person" are the very words which guarantee that equal chance to "ALL"; they stand as the supreme political achievement of the human race, the prize of milleniums of struggle. If the Constitution had stated it protected the life of "any person - except the unborn," then its words would support Roe v. Wade. But its words say "any person," without any exceptions at all.

The Supreme Court of West Germany held that the words, "Everybody has the right to life," did include the unborn; it explained that the word "everybody" is universal.[3]

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3. R. Destro, Abortion and the Constitution The Need For A Life Protective Amendment, 63 Cal. L. Rev. at 1341-51 (1975). In 1975 the Supreme Court of West Germany ruled that the phrase in its Constitution, "Everybody has the right to life," did include the unborn, that "Abortion is an act of homicide," and

The Constitution extends its guarantee of life to "any person." The letter of the law permits no exceptions; on their face the words "any person" do include the unborn.

2. THE MODIFIER "ANY" INVOKES A VIRTUALLY IRREBUTTABLE PRESUMPTION THAT THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES THE UNBORN.

The Court never studied the letter of the law - the universal words "any person." Instead the Court focused on the isolated word "person," and ignored its modifier "any," which invokes a virtually irrebuttable presumption in favor of life that the words "any person" do include the unborn.[4]

By reading the guarantee of life to "any person" as if it merely said "some persons," the Court did the most forbidden

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the state had a "duty ... to protect unborn life." It noted "Everybody" is universal:

> The right to live is guaranteed to everybody who is "alive." No distinction can be made among the several stages of developing life before birth, or between prenatal or postnatal life. "Everybody" ... means every "living person,"... therefore, "everybody" in this sense also includes unborn human beings.

4. See burden of proof, infra p. 39.

thing and reduced to nothing what is deemed the most important law in the history of political institutions.

3. THE SPIRIT OF THE LAW, THAT "ALL MEN ARE CREATED EQUAL," SHOWS THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES THE UNBORN.

Roe v. Wade violates the spirit of the law, as well as its letter. The promise that "all men are created equal" and endowed with an "unalienable" right to "life" is the guiding spirit of American law. The Supreme Court itself ruled it is the spirit of the Fourteenth Amendment:

> "The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life...' While such declaration of principles may not have the force of organic law ... yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than ... to secure the equality of rights which is the foundation of free government." Gulf, Colo. & S. Fe Ry v. Ellis, 165 U.S. at 159-160 (1896).

There is no real medical dispute that the unborn have been created.[5] Reading the letter of the Constitution, the guarantee of life to "any person," in the spirit that "all" are "created equal," and "all" shall get their equal chance to live, proves that the words "any person" do include the unborn. Concerning the right to life, the unborn are the equal of anyone.

4. HISTORY SHOWS THE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

The last time this Court attempted to imply an exception to the words "any person" was Dred Scott v. Sandford, 19 How. 393 (1857). The 13th and 14th Amendments were intended to overrule this decision that the words "any person," as used in the 5th Amendment, did not include Negroes; there was a constitutional right to own a slave; the phase "all men are created equal" did

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5. The uncontradicted medical evidence in the Texas brief in Roe v. Wade showed the fetal heart begins "pulsations at 24 days"; and "brain waves have been noted at 43 days"; and the unborn child is "alive."

not include Negroes; Congress could not prohibit slavery in the territories; and Negroes could not sue in federal court to see if they were slave or free.

Abraham Lincoln was a leading opponent of Dred Scott. If officials can say all men are created equal except Negroes, he asked, "where will it stop?" He denounced Dred Scott as based on "falsehood," and he alleged a conspiracy by the U.S. Supreme Court, two Presidents, and leading members of Congress, to make slavery legal everywhere and overturn the foundation of our government. Explaining why he would not obey it, President Lincoln said that Dred Scott resulted in "the rule of minority, as a permanent arrangement" which was "wholly inadmissible" and if the President were bound by Dred Scott, "the people will have ceased, to be their own rulers."

Dred Scott triggered a civil war, and President Lincoln defied the Court's decision, that there was a constitutional

right to own a slave, when he emancipated slaves and declared them to be "forever free." He reminded us at Gettysburg that we were fighting to see whether a nation dedicated to the principle that "all men are created equal" could "long endure."

The Fourteenth Amendment was intended to rededicate this nation to this original proposition. One of its framers explained:

> "It establishes equality before the law, and it gives to the humblest ... the most despised ... the same protection before the law as it gives to the most powerful.... Without this ... there is no republican government." Rep. Jacob Howard, quoted in 1 B. Schwartz, Statutory History of the United States: Civil Rights 262 (1970).

The framers intended to prevent another Dred Scott catastrophe of judges ever again implying exceptions to the words "any person" to exclude anyone; they employed the universal words most suited for this purpose. And the people had already enacted criminal abortion laws to protect all stages of unborn life, showing the guarantee of life to "any person" means what it says.

Roe v. Wade is simply another Dred Scott disaster which rests on historical contradictions so insane that to permit it is to confess that men cannot be governed by truth, reason, or laws.[6] The Court did the most forbidden thing, and defied the "unalienable" guarantee of life to "any person," the two most important words ever written into law.

The letter of the law, its spirit, its history, its presumption in favor of life, the medical facts known to the 19th century, as well as the 20th, unite to permit only one lawful conclusion: the guarantee of life to "any person" does include the unborn.

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6. Roe v. Wade rests on the contradiction that without one word of explanation, the framers intended their very promise of life to all, to "any person," to sweep away all their abortion statutes, and make killings, which they had already condemned as criminal, a fundamental "liberty" ranked along with free speech. Roe v. Wade further pretends that the framers somehow silently connived to repudiate a major point of the civil war, so that, in the manner of Dred Scott, judges would be at liberty to again produce more convulsions by implying more exceptions to the words "any person."

II.

ROE v. WADE IS VOID BECAUSE IT CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" AND CONDEMNED TO DEATH MILLIONS OF VICTIMS WHOM THE CONSTITUTION ENDEAVORS TO PRESERVE.

1.

ROE v. WADE CRIMINALLY DEFIED THE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT DECREED KILLINGS TO BE "LIBERTY" WHICH THE PEOPLE HAD DEFINED TO BE "MURDER." THE COURT DECREED "MASS MURDER IS LIBERTY."

When the Fourteenth Amendment was adopted in 1868, an abortion was murder if the child was "born alive." And a child could be "born alive" long before the Court's arbitrary point of "viability."[1]

An 1859 study by the American Medical Association stated the law of murder throughout the United States:

> If a person, intending to procure abortion, does an act which causes the

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1. This Court arbitrarily set the point, where the law could begin to protect the unborn, at "viability" (about 7 months gestation) "because the fetus then presumably has the capability of meaningful life outside the ... womb." Roe v. Wade, supra, 163. The point is arbitrary, because the Court cannot explain why (in legal and medical precedent) it can be criminal to kill the unborn a few days after viability, but must be "liberty" to kill the unborn a few days before. The Court invented it.

> child to be born earlier than its natural time, and therefore in a state much less capable of living, and it afterwards die in consequence of such premature exposure, the person who by this misconduct brings the child into the world, and puts it into a situation in which it cannot live, is guilty of murder.[2]

Yet in 1973, without any investigation of the law of murder, the Court decreed this very killing to be "liberty" which the American people had universally defined to be "murder." In plainest terms, the Supreme Court decreed: "MASS MURDER IS LIBERTY."

A. THE ENGLISH COMMON LAW WAS THE LAW OF THE LAND IN COLONIAL AMERICA

America's first settlement at Jamestown followed the English common law, as did other colonies. The common law defined an abortion in which a "quick" (about 4 months gestation) child died after being "born alive" to be "murder."[3] So if

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2. Reported in A.S. Taylor, A Manual of Medical Jurisprudence 462 (6th ed. 1866). He described the AMA report as "a complete and comprehensive exhibit of laws of each of the United States." Id., at 460.

3. Coke, 3 Inst. 50; Hawkins, 1 Hawkins Ch. 13, s. 16; Blackstone, 4 Bl. Com. 198.

the child were "born alive" (even if not "viable"), Coke said the abortion is "so horrible an offense" and "this is murder."[4]

Regina v. West involved this very abortion of a quick, but pre-viable child:

> "The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery ... by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died.
> ....
> "A medical witness stated ... that it was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Regina v. West, 2 C & K 784, 786-788 (1848).

Although not yet viable, the judge cited Coke and instructed the jury that if the child were "born alive," the abortion was

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4. Coke, 3 Inst. 50. "This work is executed with so much learning and judgment, that I do not recollect that a single position in it has ever been judicially denied....(I)t may still be considered as the fundamental code of the English law." 14 The Writings of Thomas Jefferson 57 (Bergh ed. 1907). Jefferson was an authority on colonial law, serving on the 1776 committee which adapted Virginia's laws to republican form, the common law being assigned to him.

murder.[6] The English writers cited this as the correct statement of the law.[7]

Thus Roe v. Wade decreed killings to be "liberty" which had been condemned as "murder" since earliest colonial times.

B. "BORN_ALIVE"_ABORTIONS_WERE_MURDER_WHEN THE_FOURTEENTH_AMENDMENT_WAS_ADOPTED.

The English common law is the dictionary which courts use to construe the state and federal homicide statutes.[8]

By the time the Fourteenth Amendment was adopted, American legal authorities had

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6. Regina v. West, 2 C & K at 788: "I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder."

7. 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865).

8. Clarke v. State, 117 Ala. 1 (1898); Hamilton v. United States, 26 App. D.C. 382 (1905).

long followed the common law rule that abortions of pre-viable children "born alive" were murder. In 1858 the preeminent legal writer of the 19th century explained:

> "If a person intending to procure abortion, does an act which causes a [quick] child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies, in consequence of its exposure to the external world, the person who by this misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder" F. Wharton, A Treatise on the Law of Homicide in the United States 93 (1855).

This was the uncontradicted view in the United States when the Fourteenth Amendment was adopted.[9] Courts applied this law of murder.[10] It was still the law in 1973.[11] In 1975 the New Jersey courts

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9. 2 J.P. Bishop, Commentaries on the Criminal Law 365 (4th ed. 1868); A.S. Taylor, supra, 462, 517.

10. Clarke v. State, 117 Ala. 1 (1898). "In Georgia ... the wilful killing of an unborn child so far developed as to be ... called 'quick,' is considered as murder." Porter v. Lassiter, 87 S.E. 2d 100, 102 (1955).

11. R. Perkins, Criminal Law 30 n.17 (2d ed 1969).

applied this 17th century murder law to the killing of a pre-viable fetus born alive:

> That a fetus may be the victim of murder if it be born alive has long been a part of our common law....Coke, Institutes 58 (1648).[12]

For almost four centuries governments came and went, but the law that born alive abortions are murder, which is binding on the U.S. Supreme Court,[13] remained the law of the land.

Thus Roe v. Wade decreed killings to be "liberty" which had been universally condemned by the framers and adopters of the Fourteenth Amendment to be "murder."

C. THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES CHILDREN GUARDED BY THE MURDER LAW

The guarantee of life to "any person" in the Fourteenth Amendment must include

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12. State v. Anderson, 343 A. 2d 505, 508 (1975), affirmed 413 A. 2d 611 (1980). The courts rejected the claim it was not murder because "the infants were never capable of maintaining a separate and independent existence." Id. at 615.

13. Chief Justice Marshall ruled that the Supreme Court must accept the construction given by a state to its own statute. Pollard v. Dwight, 4 Cranch 421, 429.

all persons whose lives were protected by the law of murder when the Amendment was adopted. No dispute is even possible.

If the killing of Jews had been defined to be murder in 1868, it is certain that the framers did not intend to exclude Jews from the guarantee of life to "any person" so it would be "liberty" to kill Jews with impunity from criminal laws. Changing the names of the victims does not change the legal result.

The people who framed and adopted the Amendment had condemned the taking of a crying, pre-viable infant from its mother's womb to be murder. Thus it is certain that they did not intend to exclude the lives of these children from the guarantee of life to "any person" so it would be "liberty" to kill them with impunity from murder laws.

By arbitrarily setting "viability" as the point the law could begin to protect unborn life, the Court decreed the same

killing to be "liberty" which the American people had condemned as "murder."

The words "any person" do indisputably include children protected by the law of murder. And since personhood under the Constitution does not just fade away with time, like some magic disappearing ink, the right to life of these children is still guaranteed by the Fourteenth Amendment.

D. ROE_v._WADE_ALLOWS_HYSTEROTOMY_ABORTIONS

Roe v. Wade hysterotomy abortions, basically Caesareans, result in children "born alive."[14] As explained to Congress:

> With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry.... Almost all were born alive.[15]

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14. Jeffries and Edmonds, Abortion: The Dreaded Complication, Philadelphia Inquirer, August 2, 1981.

15. Hearings on Constitutional Amendments on Abortion, before subcomm. on Civil and Constitutional Rights, of the House Comm. of the Judiciary, 94th Cong., 2d Sess., Ser. 46, Part 1, at 397 (1976) (statement by Dr. John Willke, M.D.). There are about 140,000 second stage abortions each year. Washington Post, April 26, 1985, A11. Most methods can result in a child born alive.

When the Fourteenth Amendment was adopted, these hysterotomy abortions were murder. Thus the lives of the children are still guaranteed by the Amendment, and the killings are still murder.

F. THE DECREE "MASS MURDER IS LIBERTY" OVERTHROWS THE U.S. CONSTITUTION

Is a government of laws founded upon evidence, or the mere naked decrees of men holding office for life? The evidence proves that the lives of these children are guaranteed by the U.S. Constitution.

This evidence for the unborn is exactly the same evidence which many people must rely upon to prove their lives are guaranteed by the U.S. Constitution.[16] If

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16. Suppose it were claimed in federal court that it is "liberty" to kill the insane, or invalids, or Jews. What factual, non-argumentative evidence could be found to establish their right to life under the U.S. Constitution?

As with the unborn, it would do no good to object that no one ever heard of a "liberty" to kill them - or to object that such killings had thereto been criminal.

The Amendment merely states that it protects the life of "any person." So, as with the unborn, it does not expressly

the evidence is ineffective for the unborn, then the Roe v. Wade precedent can grow to a "liberty" to kill virtually anyone. If the Supreme Court decreed it "liberty" to kill Jews, this same evidence would prove it "murder," and not "liberty." Judges may have more sympathy for other victims, but changing the names of the victims will not change the legal result.

Roe v. Wade murders reason itself. In his novel, "1984," Orwell described how a tyranny defrauded its subjects into obedience with the "doublethink" slogan "FREEDOM IS SLAVERY." Although this science fiction appears improbable, the U.S. Supreme Court has defrauded the United

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refer to them; and its legislative history does not appear to expressly refer to them.

The principle that all people are "created" equal, with an "unalienable" right to "life," having been sneered out of court in Roe v. Wade, now provides no assurance for anyone.

As with the unborn, the murder laws don't expressly refer to the insane, or invalids, or Jews; the intention of the legislators is found in the common law.

If the evidence cannot protect the unborn, the lives of many are imperiled.

States into obedience with the ultimate falsehood: "MASS MURDER IS LIBERTY."

Abraham Lincoln ridiculed Dred Scott by reducing it to its plainest terms:

> [We hold these truth to be self-evident, that] all men are created equal - except Negroes.
> That if any one man, choose to enslave another, no third man shall be allowed to object.

The Fourteenth Amendment intended to prevent this forever. Yet Roe v. Wade, reduced to its plainest terms, asserts:

> We hold these truths to be self-evident, that all men are created equal - except those created to be murdered.
> That if any one man, choose to murder another, no third man shall be allowed to object.

By changing the names of the victims, the Supreme Court has duplicated the decree of "the supreme judge" of Nazi Germany who asserted the killing of Jews to be legal.[17]

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17. United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1011-1014 (1951). The Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, since they had acted "within the authority" of the "decrees" of "the supreme judge." Id. at

The key doctrines of the Nazi judiciary have been adopted by the courts of the United States: a "supreme judge" which decrees mass murder to be legal; and lower judges who rule they must blindly obey.[18]

The Court did exactly what the guarantee of life to "any person" was intended to prevent, and decreed murder to be legal, by giving "murder" the new name "liberty." But Chief Justice Marshall condemned such sham:

> "Is the proposition to be maintained that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief which is expressly forbidden by words most appropriate for its description; may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be evaded by giving a new name to an old

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983-85. Their "supreme judge" had decreed killings to be legal which had been defined by statute to be criminal. But the tribunal held, "The dagger of the assassin was concealed beneath the robe of the jurist."

18. Ernest v. U.S. Attorney etc., cert. denied 475 U.S. 1084 (1986). The U.S. District Judge ruled that Roe v. Wade was "the worst decision by the Supreme Court in the history of the Court." But he stated that even if the Supreme Court decreed it liberty to kill Jews, he must obey and permit the killings to continue.

thing? We cannot think so." Craig v. Missouri, 3 Pet. at 433 (1830).

Thus the United States is ruled by the decree "MASS MURDER IS LIBERTY." But murder is still murder, no matter what new name the Court gives it. This is the most catastrophic crime in history. This precedent of judicial alchemy to convert murder into "liberty" can be evoked at whim to kill anyone; it cancels the "unalienable" guarantee of life and makes everybody a mere hostage of this Court; it is a virtual murder gun held to everyone's head - all life now depends merely on judicial whim; it defies the consent of the governed; it smashes the hopes of the whole human race for government by truth and laws, and reduces government to the mere matter of which murderer can grab power and be obeyed. Again people must struggle-to ensure that the nation dedicated to the proposition that "all men are created equal" shall not "perish from this earth."

ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT FABRICATED EVIDENCE TO FALSELY IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN.

The 19th century abortion statutes supplanted the medieval view that unborn life began at "quickening"[1] and expanded protection of law to all stages of unborn life; they prove the guarantee of life to "any person" includes the unborn, that no distinction can be made among the stages of unborn life.

When the Fourteenth Amendment was adopted in 1868, over three-fourths of the ratifying states had already made abortion at any stage of gestation a crime.[2] Within a few years, these statutes were universal.

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1. "Life is the immediate gift of God, a right inherent by nature in every individual: and it begins in contemplation of law as soon as the infant is able to stir in the mother's womb." 1 Bl. Com. 126.

2. The statutes are set out in Quay, Justifiable Abortion, Medical and Legal Foundations, 49 Geo. L. J. 447-520 (1961).

And in those few States still following the common law, judicial revision makes it impossible for this Court to assert with any assurance that it was any different than the prevailing statutes:

> By the ancient common law ... as the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offense to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that abortion is a crime at common law without regard to the stage of gestation.[3]

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3. Lamb v. State, 67 Md. 524 (1887). Some state supreme courts rejected medieval medical views and ruled that the common law made abortion at any stage of gestation a crime. Mills v. Comm., 13 Pa. 631 (1850); State v. Slagle, 83 N.C. 544 (1880); State v. Reed, 45 Ark. 333 (1885).

Wharton, a standard 19th century text, stated that under common law "the protection of the law was cast round an unborn child from its first stage of ascertainable existence, no matter whether 'quickening' had taken place or not." F. Wharton and M. Stille, Treatise on Medical Jurisprudence 927-28 (2d ed. 1860).

And those state supreme courts which ruled that abortion prior to quickening was not a common law crime were immediately

The theory of a "liberty" to kill the unborn faced a fatal contradiction. How could the Court dare to Dred Scott-like imply an exception to the guarantee of life to "any person" in order to declare killings to be "liberty" which the people had defined to be criminal? This absurd contradiction wrecks Roe v Wade.

To resolve this fatal contradiction the Court fabricated the hypothesis that the 19th century criminal abortion statutes were not intended to protect unborn life, but were only intended to protect the mother. This falsely implied that the people never intended the lives of the unborn to be protected by law. This false hypothesis was fabricated as follows.

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overruled by their legislatures which made abortion at any stage of pregnancy a crime. Comm. v. Parker, 50 Mass. 263 (1845), was immediately overruled by Mass. Acts & Resolves ch. 27 (1845). State v. Cooper, 22 N.J.L. 52 (1849), was immediately overruled by N.J. Laws at 266 (1849). Abrahams v. Foshee, 3 Iowa 274 (1856) was overruled by the next legislature, Iowa Rev. Laws, tit. XXIII, ch. 165. art. 2, sec. 4221 (1860).

A.

The Court first asserted as fact:

> "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v. Wade, 410 U.S. at 148.

The only authority cited was a 20th century medical history book.[4] But this book only described the hazards of major surgery in general prior to Lister's discovery of antiseptics; the abortion operation was not mentioned anywhere in the entire book.

The 19th century obstetric authorities throughout the Western world prove that abortions by physicians were "perfectly safe" to the woman.[5] They prove the Court's assertion of fact to be false.

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4. Haagensen and Lloyd, A Hundred Years of Medicine 19 (1943), cited in Roe v. Wade, supra, at 148 n.43.

5. 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96 (1802). He was a standard English authority. They based their judgments on their own experience in performing abortions, and from hundreds of cases reported from around the world. In addition to perforation, other procedures were also safe. A French physician wrote "experience has proved that the dangers of the operation are reduced to a small

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians generally used the ancient method,[6] which one physician traced back 2000 years,[7] and which they described as "perfectly safe" to woman.

The Court did not examine even one 19th century obstetric textbook; and they prove its assertion, "the procedure was a hazardous one for the woman," to be false.

Since abortion was not dangerous to the life of the mother, the only motivating

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matter." A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530 (4th Am. ed. 1852). The preeminent American physician wrote "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293 (1864).

6. Dr. Denman, a standard authority in England, wrote in 1802: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus," which resulted in the expulsion of the fetus from the womb, which was "perfectly safe" to the woman. 2 Denman, supra, at 96-99.

7. F. Ramsbotham, M.D., The Principles and Practice of Obstetric Medicine 724 (4th ed. 1856).

purpose the abortion statutes could have had was to protect the lives of the unborn from destruction by abortions, even safe abortions by physicians. Had it been the purpose of the legislators to only protect the mother, they would have simply required abortions, which were known all over the western world to be safe to the mother, to be performed only by physicians.

B.

The Court next asserted: "Abortion mortality was high."[8] This is asserted as fact. The Court cited no authority to support it. The 19th century obstetric authorities prove this assertion to be false; their medical texts show that the abortion operation was "perfectly safe."

The purpose of the Court's false assertion of fact is to go beyond the mere theory that abortion was hazardous to the mother, and infer that the carnage was so

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8. Roe v. Wade, 410 U.S. at 149.

great as to call for legislation to protect women from the medical profession.

C.

Upon these two false assertions of fact, the Court next falsely inferred:

> "[A] State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v. Wade, 410 U.S. at 149.

This is a false inference, drawn from two false assertions of fact. Moreover, the 19th century treatises on criminal law expressly stated that these abortion statutes were intended to supplant the ancient common law and protect the lives of the unborn during all stages of gestation:

> "The notion that a man is not accountable for destroying the child before it quickens, arose from the hypothesis that quickening was the commencement of vitality with it, before which it could not be considered as existing. This "absurd distinction" ... is now exploded in medicine.... The foetus is certainly ... as much a living being immediately after conception, as at any other time before delivery.
>
> ....
>
> "There is as much vitality ... on one side of quickening as on the other, and ... the infant is as much entitled to

> protection ... a week before it quickens as a week afterwards.... Acting under these views, the legislatures ... passed acts making ante-quickening-foeticide individually penal." 1 F. Wharton, A Treatise on the Criminal Law of the United States 656-57 (5th ed. 1861).

There is no 19th century authority to the contrary. If the purpose of these laws had been to protect the mother, and not the child, these texts would certainly have noted such an important thing.

And State supreme courts ruled that these statutes protected the unborn:

> "(T)he statute ... essentially changed the common law. There is a removal of the unsubstantial distinction, that it is no offense to procure an abortion, before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate.... It is now equally criminal to produce abortion before and after quickening." Smith v. State, 33 Me 48 (1851).

Since abortions by physicians were known all over the western world to be safe to the mother, the motivating purpose of these abortion laws could only have been to protect the lives of unborn children from destruction from abortions. That

legislatures prohibited safe abortions by physicians, despite the great danger to the mother from abortions by criminals,[9] shows their great respect for unborn life.

D.

The Court next made its irrelevant study of the single word "person," and held it "does not include the unborn":

> "(O)ur observation ... that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v. Wade, 410 U.S. at 158.

The Court could not find even one 19th century authority to support this result; the whole weight rests on the Court's "major portion - far freer" assertion, which is false.[10] The reverse is closer to

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9. "In thirty-four cases of criminal abortion ... twenty-two were followed...by death, and only twelve were not. In fifteen cases necessarily induced by physicians, not one was fatal." H.R. Storer, M.D., On Criminal Abortion in America 43 (1860)

10. The ancient common law only prevailed in the early 19th century. By mid-century, a majority of the States which ratified the Amendment had already enacted statutes

the truth. The evidence indicates that legal abortion was far freer in 1973, than when the Amendment was adopted.[11]

The Court's "major portion - far freer" doctrine, were it even true, is absurdly irrelevant[12] and ominously skirts

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which punished abortion throughout gestation. (Supra n.2) By 1868, over three-fourths had enacted such statutes; and shortly they were universal. In those few states with no statute, this Court cannot claim with assurance that the common law was any different. (Supra n.3) Thus the "prevailing law" for the last half of the 19th century; it was about the same as existed in most states in 1973; and "legal" abortion was not "far freer" then.

11. The statutes listed in Roe v. Wade, 410 U.S. at 140 n37, show that by 1973 four states permitted abortion on demand, while fourteen permitted abortions for other reasons not allowed in 1868. The statutes prevailing in 1868 only permitted abortions to save the life of the mother or child. Thus legal abortion was far freer in 1973 than in 1868, although in most states it was still about the same as it was in 1868.

12. The same thing could be said about "legal slavery," which really was "far freer" for the "major portion" of the 19th century than it is today. Would this prove a right to own a slave today? If the Court could ignore the events of 1860 to 1866 - it could plausibly reaffirm its Dred Scott rule that there was a right to own a slave.

the central issue of the law existing in 1868, and the reason for the vast change.

The Court's assertion that "legal abortion" was then "far freer" refers to the ancient common law that abortion prior to "quickening" was not a crime, on the theory that life began at "quickening." A physician, who helped draft Virginia's 1848 abortion statute, explained its purpose was to supplant this "exploded error":

> "(T)hat the embryo is endowed with an inherent vitality from the first moment of conception, and is therefore as much entitled to the protection of the law before the period of 'quickening' as after it, every well-informed physician must yield a ready assent. The old doctrine, once held by medical men ... that the foetus first becomes animated, or endowed with distinct vitality, at the moment when the sensation of quickening is experienced by the mother, has been long since banished from the domain of science ... and now only finds a retreat in the dark and ancient caverns of the common law.
> ....
> "(T)he civil rights of the unborn child are perfect from the very commencement of its being." L.S. Joynes, M.D., "Foetus in Utero," Virginia Medical Journal 179-180, 187 (1856).

The 19th century medical and legal authorities, with none to the contrary, condemned this ancient theory of life:

> "(I)t is the duty of every accoucheur earnestly to protest against the ancient theological and legal opinion that, prior to the fourth month, the embryo had no proper existence.... (T)he merest tyro in physiological investigations must be convinced of the falsity of all such opinions." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 78 (1864).

Yet the Court exactly adopted, as constitutional law, a view of unborn life which the 1860 president of the AMA called "a barbarous physiology" and which courts ruled "never ought to have been the law anywhere,"[13] and which 19th century legislatures condemned as criminal. The AMA president said in urging States to protect all stages of unborn life:

> "This relic of a barbarous physiology needs to be exploded, and the truth should be generally promulgated, that, from the moment of conception, a new being is engendered." 13 Transaction of the American Medical Association 56-57 (1860).

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13. Mills v. Commonwealth, supra, 632.

The abortion statutes were urged by America's most eminent medical professors and physicians, and they were intended to protect all stages of unborn life:

> From the moment of fecundation, the new being becomes independent ... its individuality is complete.... (T)here is a progressive ... advancing from one degree of perfection to another. Every protection, therefore, which is extended by human legislation to the young infant ... should be equally effectual in securing the life of the embryo from the earliest period of its existence.[14]

The abortion statutes show the universal guarantee of life to "any person" was not based on "a barbarous physiology"; the Amendment recognizes that there is no time during unborn life that a rational line can be drawn to permit the killings.

But the Court accepted the medieval view, that life began at "quickening"

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14. H.L. Hodge, M.D., The Principles and Practice of Obstetrics 78 (1864). Hodge's "name had become a household word throughout the land" and his book "valued among the very first works on obstetrics ever issued from the American or foreign press." R. Penrose, M.D., Discourse on Life of H.L. Hodge 20-21 (1872)

(about 4 months), and arbitrarily enlarged it to "viability" (about 7 months), making a "liberty" to kill which even its only authority, the ancient common law, condemned as criminal. Thus the basis of the Court's decree that "the word 'person'... does not include the unborn." Thus 20th century constitutional law was founded on medieval medical theory which was rejected as false in the 19th century, and remains false today.

In short, the Court manufactured a constitutional right to kill, out of "an exploded error" that an ante-quick child was not alive, which the "merest tyro" knew to be false, and was universally condemned as "a barbarous physiology" found only in "dark and ancient caverns," which 19th century judges ruled "never ought to have been the law anywhere," and which legislatures condemned as criminal everywhere, in order to Dred Scott-like blast an exception to the guarantee of life to "any person," so

tens of millions of victims could be killed with impunity from criminal statutes. This is not law; it is murder under ruse of law.

The Court's arbitrary shopping among medieval notions, rejected by the framers as "barbarous," to define the unalienable guarantee of life to "any person," is a another murder gun precedent pointed at the head of all Americans; it makes everyone a hostage of this Court; judges can arbitrarily pull its trigger to destroy anyone.

The Court now has bloody precedent for doing the most forbidden act; it directly defied the unalienable guarantee of life to "any person," the two most important words ever written into law, and condemned to death millions of victims whom the U.S. Constitution endeavors to preserve. It can now happen to anyone; the Court has cancelled the "unalienable" guarantee of life to "ALL," and sealed it in blood.

E.

In construing its equivalent word "everybody," the Supreme Court of West Germany ruled it did include the unborn:

> "No distinction can be made among the several stages of developing life before birth, or between prenatal and postnatal life." [Supra page 3 n.3]

The history of the criminal abortion statutes proves the framers made this same conclusion when they universally guaranteed life to "any person" without any exceptions: there is no time during unborn life that the law can withdraw its protection and permit the killings; rather it is the duty of the law to protect the weak.

Without need of assistance from Chief Justice John Marshall's burdens of proof, as described in the next section, history permits only one rational conclusion: the universal and "unalienable" guarantee of life to "any person" includes the unborn during all stages of unborn existence.

3.

THIS COURT CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" WHEN IT DEFIED THE RULINGS OF JOHN MARSHALL AND USED A "GUILTY UNTIL PROVEN INNOCENT" BURDEN OF PROOF TO INFER THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN.

The Court used the correct burden when it previously construed "any person."[1] Yet when it came to the unborn, it used a "guilty until proven innocent" burden.

A.

THE BURDENS, DESCRIBED BY CHIEF JUSTICE MARSHALL, PROVE THE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

Chief Justice John Marshall described the conditions the Court must satisfy to lawfully imply an exception to universal terms in the U.S. Constitution.

Before the Court can exclude the unborn from the guarantee of life to "any

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1. The Court properly ruled that the words "any person" included Chinese aliens, saying the words are "universal in their application, to all persons ... without regard to any differences." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). And this Court was so sure that the words "any person" included "corporations," it refused to even allow counsel to argue against it. Santa Clara v. So. Pac. RR, 118 U.S. 394, 396 (1886).

person," so they can be killed with impunity from criminal laws, the Court must prove that including the unborn within the terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[2]

The Court must prove that if the right to life of the unborn had "been suggested [to the framers] the language would have been so varied, as to exclude it,"[3] and the

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2. Sturges v. Crowninshield, 4 Wheat. 122, 202-203 (1819). When the Constitution uses universal words, and a case is "within the very words of the Constitution," it would be "dangerous in the extreme" to infer the case "is not within its spirit" because "we believe the framers of that instrument could not intend what they say" unless the "absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

3. Dartmouth College v. Woodward, 4 Wheat. 518, 644-45 (1819). "It is not enough to say that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within

framers would have changed the guarantee to read: "Nor shall any state deprive any person, except unborn persons, of life ... without due process of law."

These are the burdens which protect the lives of all Americans from government sanctioned extermination, as happened in Nazi Germany; they carry the life of each American in their hands. The Court bears the heaviest burden of proof to imply an exception to the guarantee of life to "any person" so millions of victims can be killed with impunity from criminal laws.[4]

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the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd ... as to justify those who expound the constitution in making it an exception."

The Court used these burdens when it ruled it could not read its jurisdiction, which includes "all cases" arising under the Constitution, as if it merely said "some cases." Cohens v. Virginia, 6 Wheat 264 (1821); Martin v. Hunter's Lessee, 1 Wheat. at 339 (1816).

4. The truth of this extraordinary burden can be demonstrated by applying it to various cases. Before the Court could imply an exception to the universal terms "any person," so that Jews could be deliberately

Chief Justice Marshall's rules prove the guarantee of life to "any person" does include the unborn because "all mankind" would not unite "without hesitation" to exclude them. And the framers would not have changed the guarantee to read "any person - except the unborn," so it would be liberty to kill them, because the people had already enacted criminal statutes to protect the lives of the unborn by law. Thus the guarantee of life to "any person" does include the unborn.

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killed with impunity from criminal laws, the Court would have to prove that "the absurdity and injustice" of including Jews within the universal terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." And the Court must prove that if the case of the Jews had been suggested to the framers, they would have changed the Amendment to read: "No state shall deprive any person, except Jews, of life without due process of law." This same burden protects us all.

B.

THIS COURT EXACTLY DEFIED THE BURDEN DESCRIBED BY CHIEF JUSTICE JOHN MARSHALL.

Instead of placing the burden on the advocates of the killings to prove that including the unborn within the guarantee of life to "any person" would "be so monstrous, that all mankind would, without hesitation, unite in rejecting the application," the Court reversed the burden:

First, the Court declared a "liberty" to kill the unborn with impunity from criminal laws, before it even looked to see if the guarantee of life to "any person" included the unborn.[5]

Second, subsequently, the Court looked to see if the guarantee of life to "any person" included the unborn.[6]

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5. Roe v. Wade, 410 U.S. at 153: "(T)he Fourteenth Amendment's concept of personal liberty ... is broad enough to encompass a woman's decision ... to terminate her pregnancy."

6. Roe v. Wade, 410 U.S. at 156-157. "The appellee ... argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment."

Third, the Court admitted that if the words "any person" included the unborn, its predetermined assertion of a "liberty" to kill the unborn "of course, collapses."[7] But the Court decreed a "liberty" to kill the unborn before it looked to see if the unborn had a "guaranteed" right to live.

Thus the Court had passed its sentence of death, before it even looked to see if the Constitution guaranteed a right to live. It is analogous to a court sentencing an accused to be hung before it even heard the evidence. As Alice's Queen demanded: "Sentence first; verdict afterwards."[8]

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7. Roe v. Wade, 410 U.S. at 156-157: "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."

8. The vengeful Queen in "Alice in Wonderland" shouted "Off with her head" and when admonished that the jury must first consider its verdict, she said: "No! No! Sentence first- verdict afterwards."
So it was in Roe v. Wade - first the sentence of death; then the verdict whether the law allowed the victim to live.

Fourth, the Court's purpose for first predetermining a "liberty" to kill the unborn, was not only to shift the burden of proof from the advocates of the killings onto the unborn, but also to impose its heaviest "compelling" burden on the unborn, a burden of proof so devastating that state statutes seldom, if ever, survive it.[9]

Fifth, the Court stated that the evidence did not prove "with any assurance" that the guarantee of life to "any person" included the unborn.[10] This confirms that the Court placed the burden on the unborn to prove with "assurance" that the words "any person" included the unborn. This is the heaviest burden which can be imagined.

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9. Roe v. Wade, 410 U.S. at 155: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'" As its compelling state interest, Texas claimed that the lives of the unborn were protected by the Fourteenth Amendment. Id., at 156.

10. Roe v. Wade, 410 U.S. at 157. "Assurance" means: "To make certain and put beyond doubt." Black's Law Dictionary (4th ed. 1968).

Finally, by calling upon its false evidence to raise trifling doubts, the Court said that the unborn had not met their burden of proof and ruled "the word 'person' ... does not include the unborn."

If the Court used such burdens to decree a "liberty" to kill Jews, surely none would deny it would be murder. Judges may have more sympathy for other victims, but changing the name of the victims will not change the legal result.

When courts use such burdens to condemn victims to death, it can no longer be pretended it is still the government of the United States - any government of laws. This is still another "murder gun" precedent pointed at the head of every American; judges can arbitrarily use it to destroy anyone. The true burden proves beyond dispute that the guarantee of life to "any person" does include the unborn.

ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT USED "IRON CURTAIN" PROCEDURES TO IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN; IT USED THESE PROCEDURES TO MAINTAIN ITS KILLINGS.

The Court effected Roe v. Wade by using unconstitutional "iron curtain" procedures in a mock trial without truth.[1]

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1. A. Denial of Assistance of Counsel
Counsel did not especially represent the unborn in the U.S. District Court in Roe v. Wade. And the U.S. Supreme Court denied a request by an original party to allow counsel to especially represent the unborn and defend their right to life. Thus, counsel did not represent the unborn at any stage of the original proceedings.

B. Denial of Prior Notice
The District Court did not even look to see if the lives of the unborn were protected by the U.S. Constitution; this question was argued for the first time after Roe v. Wade reached the Supreme Court. And the Supreme Court gave the parties no prior notice of the constitutional standards, or the burdens of proof, or the evidence, which the Court used to infer that the lives of the unborn were not protected by the U.S. Constitution. The first time the parties had notice was when Roe v. Wade was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn.

C. Secret Evidentiary Proceedings
The Court used some secret evidentiary process, not open to the parties, to find

And the Court maintains its killings by using "iron curtain" procedures in mock trials without truth, despite continual objection that the Court was using criminal procedures to maintain its killings:

1. The Supreme Court willfully refuses to allow retained (no cost to taxpayers) counsel to represent the victims being

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evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. An original party objected that the Court's facts were "unknown to the parties" and it never had opportunity to cross-examine the Court's evidence.

D. Denial of Right to Cross-Examine

An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the Constitution. Since the Court found its evidence in secret proceedings, the parties had not previously seen the evidence. But the Supreme Court would not allow its evidence to be cross-examined.

E. Denial of Right to Present Evidence

An original party asked permission to present evidence under the new constitutional standards, which it had not seen before, to show that the lives of the unborn are protected by the Constitution. But the Court refused to allow it. And thus the killings commenced.

killed and defend their right to life.[2]

2. The Supreme Court willfully refuses to allow its evidence in Roe v. Wade, which it used to infer that "the word 'person'...

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2. Some of the cases are: Colautti v. Franklin, 439 U.S. 379, motion to allow counsel for the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel for the unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel for the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel for the unborn denied, 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel for the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel for the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel for the unborn denied 445 U.S. 959; Simopoulos v. Virginia, 462 U.S. 506, motion to allow counsel for the unborn denied 458 U.S. 1104; Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, motion to allow counsel to for the unborn denied 458 U.S. 1104; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel to for the unborn denied 458 U.S. 1104; Diamond v. Charles, 476 U.S. 54, motion to allow counsel for the unborn denied 473 U.S. 932; Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, motion to allow counsel for the unborn denied 473 U.S. 931; Hartigan v. Zbaraz, 98 L Ed 2d 478 (1988), motion to allow counsel for the unborn denied 479 U.S. 1003.

does not include the unborn," to be confronted and cross-examined.[3]

3. The Supreme Court willfully refuses to allow evidence to be presented to show that the Constitution's unalienable guarantee of life to "any person" includes the unborn.[4]

These are basically the procedures cited by the Nuremberg Court as part of the evidence to convict the Nazi judges of complicity in extermination and murder.[5]

The Supreme Court's own rulings on due process of law show these procedures to be

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3. See cases, supra note 2.

4. See cases, supra note 2.

5. "The trials ... did not approach even a semblance of ... justice. The accused ... were denied the right to introduce evidence, to be confronted by witnesses against them.... They were ... denied the right of counsel of their own choice.... (P)roceedings ... were secret." United States v. Altstoetter, supra, at 1046-47 (1951). "Such a mock trial is not a judicial proceeding but a murder." Id., at 1164. "The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes." Id., at 1086.

unconstitutional,[6] and the willful use of these procedures to be criminal.[7]

If the Court had used these procedures to decree it "liberty" to kill Jews, it

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6. Even in civil proceedings (such as where loss of welfare is threatened) due process guarantees (1) prior notice of the factual and legal bases; (2) the right to assistance of counsel; (3) the right to cross-examine adverse evidence; and (4) the right to present evidence. Goldberg v. Kelly, 397 U.S. 254, 268-271 (1970). See also, In Re Gault, 387 U.S. 1 (1967).

Could it be possible that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S.Constitution so that she could be killed with impunity from criminal laws? This is preposterous.

The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can it permit any court to condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing the lives of all Jews are not protected by the U.S. Constitution, and it is "liberty" to kill all Jews with impunity from criminal laws.

Any victim is entitled to all the procedural protections before any court can decree that the victim's life is not protected by the Constitution, and the victim can be killed with impunity from criminal statutes.

7. "Even judges ... could be punished criminally for willful deprivations of constitutional rights." Imbler v. Pachtman, 424 U.S. 409 (1976).

would be condemned as murder. Judges may have more sympathy for other victims, but changing the names of the victims will not change the legal result.

The Court maintains its decree "MASS MURDER IS LIBERTY" by refusing to allow truth to work in its Court. No truth seeking process was left unbloodied. It is notorious that truth is not permitted to work in this Court, and that the Court falsifies history to achieve its ends.[8]

The record proves the Court used "iron curtain" procedures, a mock trial without

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8. "The Court ... has flouted the will of the framers and substituted an interpretation in flat contradiction of the original design.... Such conduct impels one to conclude that the Justices are become a law unto themselves.... It perilously resembles ... Hitlerism." R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 408-12 (1977).

"Court had adjourned in the real world and reconvened in Cloud Cuckooland. [The Justices] began to invent a country suited to their purposes.... They have falsified the American past ... and no one in charge seems prepared to do anything about it." T. Landers, To A Traditionalist, Mr. Ron Sounds So Good, Wall St. J., edit. page, Dec. 27, 1984.

truth, to do the most forbidden thing, to defy the guarantee of life to "any person" so millions of victims could be killed with impunity from criminal statutes; and the Court maintained its killings for fifteen years by using "iron curtain" procedures in mock trials without truth. In the words of the Nuremberg court, "Such a mock trial is not a judicial proceeding but a murder."

These procedures are still another "murder gun" precedent which this Court holds to the head of every American; everyone is now a hostage of this Court; judges can use this "iron curtain" process to destroy anyone. The process makes Roe v. Wade void.[9]

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9. A more detailed description of the procedures is made in the MOTION TO ALLOW COUNSEL REPRESENT CHILDREN UNBORN AND BORN ALIVE, filed in this case, and incorporated by reference.

DUE PROCESS OF LAW HAS COMPELLED THE U.S. SUPREME COURT TO CONFESS IN COURT THAT IT IS GUILTY OF MASS MURDER, AND TO ADMIT THAT THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

For the 101st time, the U.S. Supreme Court is accused of criminally defying the guarantee of life to "any person" and exterminating millions of victims whom the U.S. Constitution endeavors to preserve.

For the 77th time, the U.S. Supreme Court is accused of mass murder in violation of state and federal statutes.

For the 81st time, this Court is accused of using criminal procedures to effect and maintain Roe v. Wade killings.

John Marshall would have called Roe v. Wade "treason to the Constitution."[1]

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1. Chief Justice Marshall wrote that this Court could not extend the Constitution "to objects not...contemplated by its framers." Ogden v. Saunders, 12 Wheat. at 332. If the Court usurped such power, it would be "treason to the Constitution." Cobens v. Virginia, 6 Wheat. at 404. By decreeing "liberty" to be the very thing which the framers had condemned to be "murder," the Court has indisputably extended the Constitution to objects not contemplated by its framers. For 15 years, "treason to the

But, for fifteen years, the U.S. Supreme Court has never denied the charges, much less attempted to prove the charges to be false. These facts are unparalleled in the legal history of the world.

Under this Court's own rulings, its silence year after year, while the victims

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Constitution" has masqueraded as "the supreme law of the land."

The Court supplanted the Constitution as the supreme law. Chief Justice Marshall wrote that "the Constitution derives its whole authority" from the consent of the governed. McCulloch v. Maryland, 4 Wheat. at 403. Yet, the Court now defies this consent; it simply invents a dream world and imposes it on the people by decree. A divided Congress is unable to control this Court, which results in rule by minority.

Thomas Jefferson warned that this Court was "the most dangerous" branch because judges were "installed for life, responsible to no authority (for impeachment is not even a scarecrow)"; and judges twist words to make "anything mean everything or nothing, at pleasure" with judges finally becoming "despots." Thus Roe v. Wade fully explained.

People have lost faith in the simple power of facts to prove: falsehood is called truth; murder is called liberty; treason is called law. This defeat of the consent of the governed as the basis of law is the most momentous revolution in human history. The way out was shown by Abraham Lincoln, who would "call things by their right names, no matter who was offended."

are being killed, is an admission that the charges are true.[2] In the Court's words:

> "Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question." United States v. Hale, 422 U.S. 171, 176 (1975).

The circumstances leave no doubt that due process has compelled the U.S. Supreme Court to confess that the charges are true.

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2. Under the tacit confession rule, failure to deny a charge is admissible as a confession that the charge is true. 4 Wigmore, Evidence, § 1071-1072 (Chadborn rev. 1972). "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick on Evidence, § 161 (1972). The Court has often affirmed this rule. "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact.... Silence is often evidence of the most persuasive character." Baxter v. Palmigiano, 425 U.S. 308, 319 (1976). And the rule is ancient. As Socrates cross-examined at his trial 2400 years ago: "(Y)ou are silent, and have nothing to say. But is not this rather disgraceful, and a very considerable proof of what I was saying?" "I may assume that your silence gives consent." Plato 41, 45 (Jowett tr. 1942).

First, the evidence makes it as clear as daylight why the Court is silent in the face of the charges: the charges are proved to be true.[3] Truth cannot be proved false.

Second, the charges were made in cases filed pursuant to the Constitution and laws of the United States. Chief Justice John Marshall ruled that judges who "close their eyes on the Constitution" and "condemn to death those victims whom the Constitution endeavors to preserve" commit "crime."[4]

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3. The Court decreed killings to be "liberty" which States had defined to be "murder." This is mere historical fact; no denial is possible. As John Marshall said, "a fact which has existed cannot be made never to have existed." Marbury v. Madison, 1 Cranch at 167 (1803).

4. Marbury v. Madison, 1 Cranch 137, 179-180 (1803). This correctly states the criminal law. Where there is an affirmative duty to act, the deliberate omission to do that duty, which results in death to others, can be prosecuted as homicide. Perkins, Criminal Law 604 (2nd ed. 1969).

The only Nazi to plea guilty at Nuremberg cited this law. When warned of Auschwitz, Speer wrote: "I did not investigate - for I did not want to know what was happening there.... From fear of discovering something which might have made me turn from my course, I closed my eyes." A. Speer, Inside the Third Reich 375-76

The Court had a legal duty to fully hear allegations that Roe v. Wade was wrongly decided. The Court affirmed its duty:

> "(I)ts opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." The Passenger Cases, 7 How. 282, 470 (1849).

Third, the Court's steadfast silence for fifteen years in the face of the scores of accusations is unparalleled in the legal history of the world; the Court cited this very circumstance as making confession by silence more trustworthy.

> "Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation." United States v. Hale, 422 U.S. 171, 176 (1975).

Fourth, not only has the Court's silence persisted in the face of repeated accusations, but it has persisted even in

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(1970). This "deliberate blindness" is complicity in criminal extermination.

the teeth of warnings that its silence was being taken as an admission that the charges are true.

Fifth, the charges described judicial crimes not surpassed in all history, that (1) judges had done the most forbidden thing, and defied the unalienable guarantee of life to "any person," the two most important words ever written into law, and criminally exterminated millions of children; (2) the United States was being ruled by the most corrupt decree which the human mind could even imagine: "MASS MURDER IS LIBERTY"; (3) due process of law had compelled the judges to confess to guilt of mass murder; and (4) the judges schemed to reaffirm the legitimacy of their murders in mock trials designed to keep truth from working in all state and federal courts.[5]

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5. In Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), the Court reaffirmed Roe v. Wade by stare decisis in a mock trial without truth.

The parties did not ask the Court to overrule Roe v. Wade. This was done by the amicus curiae brief by the Legal Defense

The United States being ruled by the decree "MASS MURDER IS LIBERTY" is the most catastrophic crime in the history of civilization; it smashes the hopes of the whole human race for a government of laws, and

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Fund for Unborn Children, as follows: "For the 52nd time, the U.S. Supreme Court is accused in its own court with mass murder." The amicus brief laid out the evidence, and concluded: "THE U.S. SUPREME COURT HAS CONFESSED IN COURT TO GUILT OF CRIMINAL EXTERMINATION, INCLUDING MASS MURDER, AND THIS IS THE LEGAL EQUIVALENT OF THE EXPRESS OVERRULING OF ROE v. WADE." But this Court responded to these arguments by saying:

> And arguments continue to be made, in these cases as well, that we erred in interpreting the Constitution. Nonetheless, the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm Roe v. Wade.

Thus, the Court's response to "arguments" that it was guilty of mass murder. When a court rules that its decree "MASS MURDER IS LIBERTY" must be obeyed without a hearing or even a question, then history could not reveal a more murderous mockery of "the rule of law." The Court hid behind stare decisis in a mock trial and used this ruse of law to defraud all lower courts into obeying Roe v. Wade without question.

reduces government to the matter of which murderer can grab power and be obeyed.

Never in the legal history of the world was it more imperative to deny charges if they were untrue. Judges, under solemn legal duty to uphold the law, are accused of mass murder. The evidence is laid out in court. The judges have done the most forbidden thing, and defied the guarantee of life. Little children are being killed. The killings violate criminal statutes. Pictures of the dead are shown to the judges. But for 15 years the judges do not meet the evidence; do not prove it false.

A government of laws can permit only one conclusion to be drawn from these facts: The U.S. Supreme Court was met in court with the truth; truth worked in the only manner in which it was permitted to work; and due process of law compelled this Court to admit, in the most emphatic manner which the mind can imagine, that the words "any person" do include the unborn.

Any judge who closes his eyes on these facts, and chooses to take part in a national scheme to kill little children, in defiance of the guarantee of life to "any person," and criminal statutes, to maintain the decree "MASS MURDER IS LIBERTY," knows he is guilty of complicity in mass murder and criminal defiance of the Constitution.[6]

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6. Roe v. Wade asserted to legalize killings which statutes had made criminal. Since Roe v. Wade is a mistake of law, all the killings since 1973 can be prosecuted.

The ex post facto provisions of the U.S. Constitution do not apply to judicial decisions which are a mistake of law. Ross v. Oregon, 227 U.S. 150, 161 (1912).

The general rule is that mistake of law is no excuse for breaking the law. R. Perkins, Criminal Law 920 (2d ed. 1969).

The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not apply to homicide cases. Model Penal Code, Tentative Draft No. 4, Comme[illegible] Sec. 2.04, page 138; R. Perkins, Criminal Law 928 (2d ed. 1969).

Thus, the law applied at Nuremberg applies to this case. Obedience to the orders of judicial superiors is no excuse for complicity in murder. United States v. Altstoetter, supra, at 983-985.

Perhaps judges responsible for the Roe v. Wade murders did not believe they were breaking the law. But as Oliver Wendell Holmes wrote: "Ignorance of the law is no excuse for breaking it.... It is no doubt true that there are many cases in which the

In explaining how the Nazi regime got away with its monstrous crimes, Winston Churchill quoted Machiavelli: "Men avenge slight injuries, but not grave ones." The Court knows that truth well; the legal foundation of the United States now rests on the assumption that the gravest crime in history cannot be avenged.

The photo on the last page shows a second stage abortion under Roe v. Wade. If the child were born alive, this Court would be guilty of murder. If the child were born

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criminal could not have known that he was breaking the law, but ... the lawmaker has determined to make men know and obey." O.W. Holmes, The Common Law 41 (1963).

Even if the Supreme Court held a gun to the head of a lower judge, and threatened death unless he obeyed Roe v. Wade, it would not be a defense to murder, for "he ought rather to die himself than escape by the murder of an innocent." 4 Bl. Com. 30.

The law makes a mortal distinction between killing and not killing: (1) any judge who stopped the Roe v. Wade killings, and made a mistake of law, could only be overruled on appeal; (2) but any judge who allows the killings to continue and makes a mistake of law, can be convicted of murder, and be sentenced to death. The law of capital murder is a hard school, where lessons are taught only one time, and mistakes of law are not forgiven.

dead, this Court would be guilty of extermination under 18 U.S.C. § 242.

Truth has worked in this Court; judges cannot stop it. Due process has compelled this Court to admit that the unalienable guarantee of life to "any person" does include the unborn.

CONCLUSION

Merely overruling Roe v. Wade will simply continue its crimes, perhaps on a less extensive scale. The Court misguided this nation and the entire world.

Now the Court must promulgate the truth, that the universal and unalienable guarantee of life to "any person," made in the Fifth and Fourteenth Amendments of the U.S. Constitution, do include the unborn, and States have a duty to protect unborn life.

Alan Ernest
Counsel

AMICUS CURIAE

BRIEF

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No. 88-805

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF OHIO,
Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICI CURIAE SAVE AMERICA'S YOUTH, INC. AND FREEDOM VILLAGE, USA IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. APPLICATION OF THE ABORTION PRIVACY DOCTRINE IN THE FAMILY CONTEXT HAS DEVASTATING CONSEQUENCES FOR MINORS, FAMILIES, AND FAMILY LAW	3
A. This Court's Abortion Decisions Destroy Relations Essential for the Enjoyment of Individual Liberty	3
B. This Court's Abortion Decisions Have Had Far-Reaching Detrimental Impact on Family Law Generally	6
II. THE OHIO STATUTE IS REASONABLY CALCULATED TO PROTECT ADOLESCENTS	10
A. The Social Reality of Abortion Discourages Parental Consultation	10
B. Many Adolescents Will Not Voluntarily Consult Parents About the Abortion Decision	11
C. Adolescents Need Parental Guidance When Considering Abortion	13
D. Parental Consultation Has a Positive Impact on a Minor's Abortion Decision	15
E. Parental Consultation Fosters a Healthier Parent/Child Relationship	18
III. THIS COURT RECOGNIZES THAT PROTECTING ADOLESCENTS JUSTIFIES A STATUTORY PARENTAL NOTIFICATION REQUIREMENT	20

TABLE OF CONTENTS—Continued

	Page
A. Minors' Rights Are Not Co-Extensive With Adults' Rights	20
B. The State May Limit Minors' Freedom	21
C. Notification Is Fundamentally Different Than Consent	22
D. Consultation Is Different Than Veto	23
E. This Court Has Upheld a Parental Notification Requirement	24
CONCLUSION	25

TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES—Continued

	Page
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State Cases:	
Allen v. Bordentown City, 524 A.2d 478 (N.J. Super. 1987)	9
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	Page
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TABLE OF AUTHORITIES—Continued

Page

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Page

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

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STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICI CURIAE SAVE AMERICA'S YOUTH, INC. AND FREEDOM VILLAGE, USA IN SUPPORT OF APPELLANT

INTEREST OF THE AMICI

Save America's Youth, Inc., is a non-profit educational and public policy organization headquartered in Washington, D.C. It is devoted to issues concerning teenagers and the problems they face in America today. It approaches these issues from a perspective grounded in a commitment to traditional moral values, including the integrity of the family. It seeks value-based solutions to youth problems and believes such solutions are possible consistent with constitutional guarantees.

Freedom Village, USA, with its principal facility in Lakemont, New York, is the largest and most successful long-term Christian home for troubled teenagers in North

America. Thousands of teens have participated in its programs over the last decade, many of whom have been through the abortion experience. Freedom Village believes, through both experience and conviction, that encouraging parental involvement in a minor's abortion decision will benefit the minor and strengthen the family.

These amici file brief to assist the Court in the present case. They believe the Court's review of Ohio's parental notification statute should be informed by an understanding of the very real impact that its decision will have on America's youth.

SUMMARY OF THE ARGUMENT

This case presents the question whether Ohio's statute requiring 24 hour actual notice to the parent or guardian of an unemancipated minor seeking an abortion violates the Constitution of the United States. It serves neither the goal of sound and consistent constitutional interpretation nor the real needs of America's youth and families to approach this case with broad platitudes about fundamental rights or freedom of "choice." Rather, this case—and the many young lives that will be affected by its result—requires an honest assessment of how this Court's past decisions, which have split families and divided parents from their children, have affected youth, families, and family law generally.

The Ohio parental notification statute in this case must be upheld. This Court's abortion decisions, when applied to minors, destroy relations essential for their ultimate enjoyment of the individual liberty the Constitution was intended to safeguard. Those decisions have also had a seriously detrimental impact on family law generally.

The Ohio statute under review is reasonably calculated to protect adolescents. The social reality of abortion discourage parental consultation and many adolescents

will not voluntarily consult their parents without some incentive to do so. Yet adolescents need parental guidance when considering abortion and, indeed, parental consultation has actual, positive consequences for the abortion decision specifically and the parent/child relationship generally.

This Court has consistently recognized the importance of protecting adolescents and has given the state considerable latitude in limiting the freedom of minors, especially when they are faced with making profoundly important decisions with potentially damaging and permanent consequences. The abortion decision is perhaps uniquely deserving of that description. Thus characteristics of both the minor decision-maker and the abortion decision itself argue in favor of a parental notification requirement.

This Court has thus recognized that the state's important interest in protecting adolescents justifies a statutory requirement of parental notification before an abortion may be performed on an unemancipated minor. Notification is fundamentally different than consent and the constitutional defect in consent requirements that this Court has consistently cited—an absolute veto power over a minor's abortion decision—is not present in this notification requirement.

ARGUMENT

I. APPLICATION OF THE ABORTION PRIVACY DOCTRINE IN THE FAMILY CONTEXT HAS DEVASTATING CONSEQUENCES FOR MINORS, FAMLIES, AND FAMILY LAW

A. This Court's Abortion Decisions Destroy Relations Essential for the Enjoyment of Individual Liberty

Application of the abortion privacy doctrine in the family context, particularly in order to allow minors to assert rights of autonomy against their parents, is un-

warranted and unwise. Individualistic notions of liberty cannot apply to minors, who lack the predicate capacity and judgment for real exercise of such liberty. Application in the family context turns the principle of individual privacy, appropriate for adults, into a right to abandon responsibility for children and other vulnerable dependents.[1] More importantly, imposing individualistic "privacy" analysis upon conflicts within intimate relationships based on love and sharing is like forcing a square peg into a round hole. It does not fit.

As so often happens in contemporary society, it is the children who pay the price. Immediately speaking the stark language of individual rights for adolescents means skipping over their need for family relationships which build the maturity necessary to give any meaning at all to the notion or exercise of such rights. America's youth have needs before they can exercise rights. "The danger of talk about rights of children is that it may encourage people to think that the proper relationship between themselves and their children is the abstract one which the language of rights is forged to suit."[2] The courts may speak in lofty terms of "liberating" a child from the direction of her parents, but

> if she remains in a dependent state without having developed the requisite skill, she is still not in fact autonomous . . . . The short term, noncommital attitudes that characterize a contractual view of family relationships fundamentally undermine this basic children's need. Parents living in 'relationships they regard as impermanent . . . are less likely to invest themselves in long run reciprocal patterns that maximixe the quality of child development.'[3]

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[1] *See generally* M. Glendon, *Abortion and Divorce in Western Law* 57 (1987).

[2] Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 Ethics 6, 9 (1980).

[3] Hafen, *The Family As Entity*, 22 U.C. Davis L. Rev. 865, 911 (1989).

Yet the Supreme Court's abortion cases dealing with statutes protecting parental participation in minors' abortion decisions disregard the unique context in which these dilemmas arise and effectively force the state and parents "to abandon youth to their rights."[4] The result is a court-imposed anomie, a "disaffiliated individual" created by the state.[5] Similar to the socialization of production, *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), and other cases have given us the socialization of reproduction. Parents are replaced with specialists and "counselors," technicians masquerading as physician/healers. The transitory tie of the marketplace—where anything can be purchased by cash, credit, or Medicaid—replaces the lasting tie of freely given parental love.

The parties challenging Ohio's parental notification statute in this case, like others in past cases reviewing parental participation provisions, are the self-appointed "surrogate parents" (for a profit, of course) of minors whose need for *real* parental support is greater than it ever has been before. These commercial substitutes distort, perhaps permanently, the minor's view of family, intimacy, support, and parenthood; they will take their money and give a smile and a pat on the back, sending them back to situations in which the problems and sexual exploitation occurred without the long-term relationship of care that parents can provide. Parents need not be perfect to care for, love, and uplift their children in ways that the wonderful, self-appointed substitutes cannot begin to comprehend, much less supply. Parents need not meet the checklist or litmus test of abortion providers in order to exercise their role and function as parents. This

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[4] *See generally* Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U.L. Rev. 605.

[5] Diamond, *The Rule of Law Versus The Order of Custom*, 38 Soc. Research 42, 56 (1971).

role is qualitatively different than, and can be substituted by, the role of those who sell abortions.

The law protects but it cannot create; it often deals in form but not content. What gives life, liberty, and the pursuit of happiness real meaning and worth to individuals is formed and learned within the family under circumstances and in relationships that transcend rigid and blunt legal doctrines. Love, affection, duty, services, virtue, obedience to the unenforceable, and the ways of living essential to the preservation of democracy are learned in the family. "In this way, the family tradition is a prerequisite to a successful individual tradition."[6] This Court should correct the myopic mistakes of its abortion privacy precedents and reaffirm clearly in the present case that state laws supporting family relations by requiring parental notice and providing an opportunity for consultation before abortion are not invalid.

B. This Court's Abortion Decisions Have Had Far-reaching Detrimental Impact on Family Law Generally

This Court has repeatedly recognized that the "[regulation] of domestic relations [is] an area that has been long regarded as the virtually exclusive province of the states." *Sosna v. Iowa*, 418 U.S. 393, 404 (1975); *see also Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982); *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859). This Court has refused to interpret federal statutes broadly so as to give federal courts jurisdiction over matters of ordinary family litigation. *See, e.g., Thompson v. Thompson*, 108 S.Ct. 513 (1988) (Parental Kidnapping Prevention Act does not create federal cause of action to resolve impasse between two states whose courts have entered conflicting custody de-

[6] Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463, 476 (1983).

crees); *Lehman, supra* (federal habeas corpus is unavailable generally to challenge state court judgments terminating parental rights); *Moore v. Sims*, 442 U.S. 415 (1979) (federal courts must abstain from hearing challenge to state removal of children when state protective proceedings are under way).

But family law is being increasingly constitutionalized and nationalized, in significant part as a result of this Court's broadly-case abortion privacy doctrine. Abortion cases have been decided on the basis of *constitutional* law. The Court has deemed the abortion privacy right to be *fundamental* and so broad as to include a woman's right to choose free from the traditional participation of spouse or of parents. Although former Chief Justice Warren Burger once rejected the prediction of "sweeping consequences," *Doe v. Bolton*, 410 U.S. 179, 208 (Burger, C.J., concurring), *Roe* and its progeny have had a dramatic, far-reaching detrimental effect on state family law generally.

This Court has decided six major abortion cases directly involving family relationships and family-protective legislation. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *H.L. v. Matheson*, 450 U.S. 398 (1981); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983); *Hartigan v. Zbaraz*, 108 S.Ct. 1064 (1988). *See also Bellotti v. Baird*, 428 U.S. 132 (1976) (*Bellotti I*). These decisions are a marked departure from this Court's traditional principles in family law cases. As Dean Bruce C. Hafen put it, the Court's "decisions on parental rights have, except in abortion cases, strongly reinforced parental authority through constitutional theories that clearly place the rights of parents within the most protected enclave of due process liberty."[7] Within the unexplainably separate abortion con-

[7] Hafen, *supra* note 3, at 908. *See also* Hafen, *supra* note 6, at 527-38.

text, however, the Court's treatment of parental involvement statutes has created a "painful awkwardness" in legal precedents.[8] These abortion decisions have carried American legal policy on abortion and family law to a further extreme of radical individualism that in any developed nation in the western world.[9]

These decisions have conveyed to lower courts, both federal and state, that constitutionally the family is merely a collection of private individuals whose relationships with one another are no different than those with strangers or with the state. For example, Justice Brennan's plurality opinion in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), states that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with separate intellectual and emotional makeup." This Court has prevented the states, and thereby the people, from enforcing or implementing their "particular theory of life" by prohibiting abortion. *See Webster v. Reproductive Health Services*, slip op. at 7 (No.88-605, July 3, 1989); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 444 (1983); *Roe v. Wade*, 410 U.S. 113, 159-62 (1973). Nevertheless, it seems this Court remains free to enforce or implement its "particular theory of family life" by injecting its abortion privacy decisions into the fabric of family law.

As a result of this view, regulation of sexual activity of minors has been particularly suspect. Federal district courts have invalidated state laws requiring parental notification or consent for provision of contraception to minors.[10] Another federal district court has held, in con-

[8] Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 Calif. L. Rev. 151, 157 (1988).

[9] *See generally* M. Glendon, *supra* note 1, at 2, 14, 24-25, 78, 112.

[10] *See, e.g., T.H. v. Jones*, 425 F. Supp. 873 (D. Utah 1973) (Utah regulations requiring parental consent for provision of contraceptions invalid on several grounds, including unconstitutional infringement on right to privacy), *aff'd on statutory grounds*, 425 U.S. 986 (1976); *Planned Parenthood Ass'n v. Matheson*, 582 F. Supp. 1001 (same result for parental notification requirement).

trast, that the doctrine of parental privacy required parental notification before provision of contraception to minors.[11]

Other examples of the many cases in which this Court's abortion decisions have influenced lower courts' analysis of parent/child relations and state regulation of minors abound. They include issues of custody disputes,[12] whether breastfeeding by a teacher is a constitutional right,[13] the right of minors to engage in extramarital sexual relations,[14] parent/child testimonial privileges,[15] the right to sexually abuse a child,[16] requirements of parental consent for minors seeking to marry,[17] and curfew regulations.[18]

[11] *Doe v. Irwin*, 428 F. Supp. 1198 (W.D. Mich. 1977), *vacated and remanded*, 559 F.2d 1219 (6th Cir. 1979), *judgment confirmed and re-entered*, 441 F. Supp. 1247, (W.D. Mich. 1977), *rev'd*, 615 F.2d 1162 (6th Cir. 1980), *cert. denied*, 449 U.S. 829 (1980).

[12] *Wise v. Bravo*, 666 F.2d 1328 (10th Cir. 1981).

[13] *Dike v. School Bd. of Orange County, Florida*, 650 F.2d 783 (5th Cir. 1981).

[14] *Johnson v. San Jacinto Jr. College*, 498 F. Supp. 555 (S.D. Tex. 1980); *People v. Dozier*, 424 N.Y.S.2d 1010 (App. Div. 1980).

[15] *In re Agosto*, 553 F. Supp. 1298 (D. Nev. 1983); *see also United States v. Penn*, 647 F.2d 876 (9th Cir. 1980).

[16] *Commonwealth v. Arnold*, 514 A.2d 890 (Pa. Super. 1986).

[17] *Moe v. Dinkens*, 533 F. Supp. 623 (S.D.N.Y. 1981).

[18] *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975); *Allen v. Bordentown City*, 524 A.2d 478 (N.J. Super. 1987).

II. THE OHIO STATUTE IS REASONABLY CALCULATED TO PROTECT ADOLESCENTS

A. The Social Reality of Abortion Discourages Parental Consultation

Abortion clinics sell abortions. At least eighty percent (80%) of all abortions performed on teenagers are performed in such clinics.[19] More than 50% of abortion clinics do not require parental notification before performing abortions, even when the patient is 15 years of age or younger. An even larger percentage fail to notify parents before performing abortions on minors over the age of 15.[20] One major study found that nearly half of the teenagers obtaining abortions at clinics admitted their parents did not know of the abortion,[21] Without a requirement to do so, most teenagers simply do not tell their parents.

Abortion is the most commonly performed surgical procedure in America[22] but it is not medically indicated in some ninety-eight percent of cases.[23] A recent study by

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[19] Henshaw & O'Reilly, *Characteristics of Abortion Patients in the United States, 1979-1980*, 15 Fam. Planning Persp. 5, 11 (1983).

[20] Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Planning Persp. 284-86 (1980).

[21] *Id.* at 287-89.

[22] *See generally Statistical Abstract of the United States: 1987* 98 (107th ed. 1987); U.S. Dept. of Health and Human Services, *Health United States* 33 (1985); T. Madden, I. Turner & E. Eckenfels, *The Health Almanac* 153 (1982). *See also* F. Jaffe, B. Lindheim & P. Lee, *Abortion Politics: Private Morality and Public Policy* 7 (1981); L. Wardle & M. Wood, *A Lawyer Looks at Abortion* 8 (1982) ("Abortion is now the most frequently performed operation in the United States").

[23] This fact is accepted by both proponents and opponents of abortion. For a detailed analysis, see Jipping, *Informed Consent*

the Alan Guttmacher Institute showed that just 4% of teenagers obtaining abortions stated that their most imporant reason was a health problem, rape, or incest.[24] The majority of abortions are performed in the unfamiliar setting of clinics where minors are often furtive, frightened visitors subject to assembly-line techniques. As this Court has observed:

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bare a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.

H.L. v. Matheson, 450 U.S. 398, 409-10 (1981). It cannot be said that the Constitution of the United States protects the brief "relationship" between a minor-as-paying-customer and abortion clinic personnel more than it does a minor-as-child and her parents.

B. Many Adolescents Will Not Voluntarily Consult Parents About the Abortion Decision

It is easy simply to state that minors who would not consent their parents over a matter as serious as abortion must necessarily already have an estranged relationship so that a parental notification requirement would serve no rational purpose. Reality is, as it most often is, different and not quite so simple. Those who would

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to Abortion: A Refinement, 38 Case Western Reserve L. Rev. 329, 372-73 nn.228-30 (1988).

[24] Torres & Forrest, *Why Do Women Have Abortions?*, 20 Fam. Planning Persp. 169, 170 (1988).

interpose a supposed constitutional rule between parents and their minor daughters, frustrating the former and isolating the latter, by merely repeating empty cliches and simplistic diagnoses must ignore reality and distort this Court's own precedents. The majority in *Matheson*, in upholding a parental notification statute, rightly criticized the "short shrift given by the dissent to 'parental authority and family integrity' " as being "contrary to a long line of constitutional cases in this Court." *Matheson*, 450 U.S. at 411 n.18.

Reality is that adolescents in general will be more likely to pull away from their parents when confronting a decision like whether to obtain an abortion. In fact, approximately 50% of all teenagers seeking an abortion will do so without parental knowledge if they have that option.[25] It appears that the families of the average teen seeking an abortion are actually more stable than those of pregnant teens not seeking abortion.[26] Adolescents typically perceive, whether accurately or not, that their relationship with their parents is poor.[27] They typically overestimate the negativity of their parents' rejection or disappointment.[28] "Almost without exception, younger

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[25] Torres, Forrest & Eisman, *supra* note 20, at 284-86; Rosen, Benson & Stack, *Help or Hindrance: Parental Impact on Pregnant Teenagers Resolution Decisions*, 31 Fam. Rela. 271 (1982) (43% obtain secret abotrions); R. Mnookin, *In the Interest of Children* 158 (1985) (estimates that "over one-half" get secret abortions).

[26] Olsen, *Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women*, 50 Am. J. Orthopsychiatry 432, 437 (1980).

[27] E. Hurlock, *Adolescent Development* 297 (4th ed. 1973); Adams, *An Introduction to Understanding Adolescents*, in J. Adams, *Understanding Adolescents* 6 (1968).

[28] Furstenberg, *The Social Consequences of Teenage Parenthood*, 8 Fam. Planning Persp. 148 (1976); Miller, *Adolescents and Authority*, in *Adolescence: The Crisis of Adjustment* 74 (1975); *Baird v. Bellotti*, 450 F. Supp. 997, 1012 (D. Mass. 1978) (Jullian,

women did not like to tell their parents. They fear parental reaction of shame or disappointment or a threatening posture." [29]

When pressure from both peers and parents come to bear, adolescents typically attempt to avoid the conflict by not communicating with their parents.[30] Teenagers are much more likely to seek advice from boyfriends and girlfriends than from parents.[31]

C. Adolescents Need Parental Guidance When Considering Abortion

As this Court has recognized, "minors often lack the experience, perspective and judgment to avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. 622, 635 (1979). That is, characteristics of both the adolescent and the decision argue in favor or encourage parental consultation. Many teenagers lack the essential abiilty to reason abstractly and to foresee consequences.[32] Unlimited freedom only adds to an adolescent's existing feeling of insecurity.[33] Adolescents have

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J., dissenting) (adolescent fears of parental rejection seldom realized).

[29] Butler & Fujita, *Abortion Screening and Counselling: A Brief Guide for Physicians*, 50 Post Grad. Med. 208, 212 (1971).

[30] Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 Am. Sociol. Rev. 385, 390, 391 (1963).

[31] Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 Am. J. Pub. H. 283, 284 (1982) (71% informed best friend, 37% informed mothers, 26% informed fathers); Klerman, Bracken, Jeckel & Bracken, *The Delivery-Abortion Decision Among Adolescents*, in I. Stuart & C. Wells (eds.), *Pregnancy and Adolescents: Needs, Problems, Management* 219, 229 (1982).

[32] Eisen et al., *Factors Discriminating Pregnancy Resolution Decisions of Unmarried Adalescents*, 108 Genetic Psych. Mono. 69, 94 (1983).

[33] E. Hurlock, *supra* note 27, at 256; J. Gallagher, F. Heald & D. Garrell, *Medical Care of the Adolescent* 243 (3rd ed. 1976).

particular need of adult guidance in areas where they have had no childhood experience.[34]

The abortion decision is extremely difficult for adult women[35] That decision requires the ability to reason abstractly and to foresee consequences. Indeed, this Court has identified the possible conequences for a woman of being denied the right to choose abortion as a reason to invalidate statutes denying that choice. *Roe*, 410 U.S. at 153. The idea, therefore, that the same decision would not be even more difficult for an adolescent defies logic, experience, and the evidence. In fact, ambivalence and confusion regarding the abortion decision are even greater for adolescents than for adults.[36] One study found that nearly 32% of young women changed their minds at least once about the pregnancy/abortion choice and nearly 20% changed their minds more than twice.[37] Teenagers who choose abortion typically talk with fewer people and receive substantially less counselling than pregnant teenagers choosing either to keep their baby or give it up for

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[34] E. Hurlock, *supra* note 27, at 252.

[35] *See* Freeman, *Abortion: Subjective Attitudes and Feelings*, 10 Fam. Planning Persp. 150, 152 (1978) (most women experienced conflicting emotions; making the decision itself was the hardest part of the abortion experience for 14%; the decision "contradicted their perceptions about themselves").

[36] *See* Horowitz, *Adolescent Mourning Reactions to Infant and Fetal Loss*, 59 Social Casework 551, 557 (1978); Babikian & Goldman, *A Study in Teen-Age Pregnancy*, 128 Am. Psychiat. 755 (1971); L. Francke, *The Ambivalence of Abortion* 180 (1978); Olsen, *supra* note 26, at 437-41.

[37] Klerman, Bracken, Jeckel & Bracken, *supra* note 31, at 219, 227; Wallerstein, Kurtz & Bar-Din, *Psychological Sequelae of Therapeutic Abortion in Young Unmarried Women*, 27 Arch. Gen. Psychiat. 828, 829 (1972) (60% of young women reported conflict regarding the abortion decision; for nearly 20% "a central emotional issue revolved primarily around their deception of their families and the burden of secrecy").

adoption.[38] Adolescents choosing abortion do so much more hastily than those choosing to keep their baby or those choosing adoption.[39]

This brief survey of just some of the adolescent psychology literature shows plainly that characteristics of the adolescent decision-maker argue in favor of somehow encouraging parental consultation. Since the evidence also shows that teenagers will not seek consultation absent some kind of requirement, a statute like Ohio's in the present case obviously serves the important state interest of protecting adolescents. Their typical reaction to crises and their lack of necessary reasoning and decision-making skills combine to place minors in a position of desperately needing the involvement of their parents, but not being able by themselves to appreciate that need.

In addition, the nature of the abortion decision itself also leads to the same conclusion about the need for parental consultation and the legitimacy of the Ohio parental notification requirement.

Since some 98% of abortions are not medically indicated,[40] the factors entering into the decision range more broadly and rise to a higher level of abstraction. Given what we all know, and what the research confirms, about the limited ability of adolescents to make more abstract decisions, [41] this alone argues in favor of parental consultation. The same factors are more likely to take the decision beyond the competence of those to whom a teenager is likely to turn—young peers or abor-

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[38] Klerman, Bracken, Jeckel & Bracken, *supra* note 31, at 231; Paulsen, *Correlates of Outcomes of Premarital Pregnancy*, 18 Fam. Planning Persp. 25, 29 (1984).

[39] Paulsen, *supra* note 38, at 28.

[40] *See supra* note 23 and accompanying text.

[41] *See supra* note 32 and accompanying text.

tion clinic personnel—while, at the same time, take the decision within the competence of those from whom a teenager is likely to turn—her parents. In the absence of some requirement of notification, then, minors will be left in a situation exactly the opposite of what this Court has consistently envisioned should be true for women considering abortion. They will lack the essential information, input, support, and guidance to make the best possible decision.

The factors entering into the decision whether to obtain an abortion are essentially non-medical in nature. In addition, as Justice Stevens has observed, "the most significant consequences of the decision are not medical in character." *Danforth*, 428 U.S. at 103 (Stevens, J., dissenting). Thus, because of the nature of the abortion decision, parental consultation is essential for the best decision to be made. "The overriding consideration is that the right to make the choice be exercised as wisely as possible." *Id.* at 104. "The State . . . has an interest in fostering such consultation as will assist the minor in making her decision as wisely as possible." *Matheson*, 450 U.S. at 419 (Powell, J., concurring).

This Court has held that abortion is different than any other situation deemed to be within the constitutional right of privacy. *Roe v. Wade*, 410 U.S. 113, 159 (1973). Justice White has described this distinction this way:

> Given that the continued existence and development —that is to say, the *life*—of such an entity are so directly at stake in the woman's decision whether or not to terminate her pregnancy, that decision must be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.

Thornburgh v. American College of Obstetricians and Gynecologists, 106 S.Ct. 2169, 2195 (White, J., dissenting). This means that the status, significance, future,

value, and worth of the preborn child in the womb are centrally at issue in the abortion decision. This makes that decision certainly more profound, more abstract, and more permanent in its consequences than any other a woman may ever face. If ever there was a decision faced by an adolescent which demanded input and support from someone other than peers or abortion clinic personnel—someone in the person and position of a parent—it is the abortion decision.

D. Parental Consultation Has a Positive Impact on a Minor's Abortion Decision

Consulting parents actually prevents more long-term stress than it creates short-term embarassment. Adolescent aborters who "avoid facing the difficulties of the abortion decision experience more stress than "non-avoiders." [42] Clinical experience has shown that openness with parents about the predicament, especially if initiated by the adolescent, has a better chance of eliciting emotional support, something she may desperately need at that particular time.[43] "In most situations, parents and teenagers can agree on what to do about an unplanned pregnancy."[44]

Abortion presents substantial risks for minors. Other amici in this case offer the Court data and research on this issue. This Court is already aware of the physical risks of abortion.[45] The emotional and psychological risks

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[42] Cohen & Roth, *Coping With Abortion*, 10 J. Human Stress 140, 142 (1982); J. Burtchaell, *Rachel Weeping and Other Essays on Abortion* 42 (1982).

[43] Butler & Fujita, *supra* note 29, at 212.

[44] Authier & Authier, *Intervention With Families of Pregnant Adolescents*, in I. Stuart & C. Wells (eds.), *Pregnancy in Adolescents: Needs, Problems, and Management* 107, 175 (1982).

[45] *See also* Jipping, *supra* note 23, at 375 n.240.

of abortion are even more profound.[46] Risks for adolescents in this category include "intense dependency needs," [47] "potential major maturational skewing," [48] suicide in severe cases of "anniversary reaction,"[49] nonadaptive or pathological mourning,[50] and a tragic cycle of "replacement pregnancies" and consequent repeat abortions.[51] Since isolation is the prime cause of adolescent suicide,[52] and loneliness is a principal emotional problem among women who obtain abortions, fostering parental consultation and the likelihood of support can directly benefit minors in a profound way.

E. Parental Consultation Fosters a Healthier Parent/Child Relationship

This Court has held that the parent/child relationship is constitutionally protected. *Matheson*, 450 U.S. at 410. The belief in a strong parental role in raising children is "deeply rooted in our Nation's history and tradition." *Bellotti II*, 443 U.S. at 638. "[A] functionally strong family" has been cited among the rights of children.[53] By providing a realistic opportunity for at least minimal parental consultation, the Ohio statute under review in this case fosters a relationship that is essential for the well-being of adolescents. As the very time in an adolescent's

[46] *See generally id.* at 376 n.241.

[47] Babikian & Goldman, *supra* note 36, at 553.

[48] Wallerstein, Kurtz & Bar-Din, *supra* note 37, at 832.

[49] Tishler, *Adolescent Suicide Attempts Following Elective Abortion: A Special Case of Anniversary Reaction*, 68 Pediatrics 670 (1981).

[50] Horowitz, *supra* note 36, at 553.

[51] *Id.* at 556, 558, 559.

[52] J. Gallagher, F. Heald & D. Garrell, *supra* note 33, at 244.

[53] P. Berger & R. Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy* 20, 21 (1977).

life when sexual activity and pregnancy may occur, the natural tension between parent and child reaches its peak.[54] Because of this conflict, parental relationships with an adolescent daughter are the most important she has during this time.[55] Without the foundation or "psychological terrain" [56] of parental relationships, adolescents will find it difficult "to develop a healthy maturity." [57] Intervention by courts or agencies that disregards parental objections "can only serve to undermine the familial bond which is vital to a child's sense of becoming and being an adult." [58] Efforts to shield pregnant minors from parental participation appear to be responsible, at least in part, for the tragic syndrome of "replacement pregnancies" and resulting repeat abortions among teenagers.[59] A significant number of teenagers who have abortions are sexually active [60] and pregnant[61] within six months to one year. Abortion without parental consultation involves a severe double "loss" of both the minor's parent and child and the evidence suggests she may compensate with yet another pregnancy.

Some will no doubt argue that a number of parents will not respond in such positive ways. This is, of course,

[54] E. Hurlock, *supra* note 27, at 297.

[55] D. Ausubel, R. Montemayor & R. Sujian, *Theory and Problems of Adolescent Development* 483 (3rd ed. 1980); J. Horrocks, *The Psychology of Adolescence* 42 (2nd ed. 1962).

[56] I Josselyn, *Adolescence* 35 (1971).

[57] J. Gallagher, F. Heald & D. Garrell, *supra* note 33, at 243.

[58] Goldstein, *Medical Care for the Child At Risk: On State Supervision of Parental Autonomy*, 86 Yale L.J. 645, 650 (1977).

[59] *See supra* note 51 and accompanying text.

[60] Perez-Reyes & Falk, *Follow-Up After Therapeutic Abortion in Early Adolescence*, 28 Arch. Gen. Psychiat. 120, 123 (1973).

[61] Steinhoff et al., *Women Who Obtain Repeat Abortions: A Study Based on Record Linkage*, 11 Fam. Planning Persp. 30, 37 (1979).

a sad fact. Nevertheless, this Court has said that such an observation is not a reason to invalidate a statute like that on review in this case. A requirement of parental notification alone serves important interests in protecting adolescents and does not contain the constitutionality fatal defect of an absolute veto.

As was the Utah statute at issue in *Matheson*, the Ohio statute in this case "is reasonably calculated to protect minors . . . by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences." *Matheson*, 450 U.S. at 412. It is "reasonably designed to ensure . . . an end which all concede is legitimate." *Webster v. Reproductive Health Services*, No. 88-605, slip op. at 22 (Opinion of Rehnquist, C.J.).

III. THIS COURT RECOGNIZES THAT PROTECTING ADOLESCENTS JUSTIFIES A STATUTORY PARENTAL NOTIFICATION REQUIREMENT

A. Minors' Rights Are Not Co-Extensive With Adults' Rights

Both within and outside the abortion context, this Court has consistently recognized that the constitutional rights of children are not co-extensive with those of adults. "Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern.' . . . sympathy, and . . . parental attention.'" *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971)).

In *Bellotti II*, Justice Powell cited three sound reasons justifying the conclusion that minors' rights are not co-extensive with those of adults: vulnerability, inability to make critical decisions in an informed and mature manner, and the importance of parents' guiding role in bringing up their children. *Id.* at 634. Each of these considerations supports the conclusion in a different way as to minors generally, and to a different degree as to individual minors specifically. The present amici, based on extensive experience and expertise, echo these reasons and seek to assist the Court in applying them in this case.

B. The State May Limit Minors' Freedom

The well-settled principle that a minor's constitutional rights are not co-extensive with those of adults supports the equally well-settled conclusion that the state has more latitude to limit the freedom of minors than it does regulating the activities of adults. *Danforth*, 428 U.S. at 74-75.[62] Since one of the justifications for this broader regulatory authority is the inability of minors to make important decisions in an informed and mature manner, "the Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences." *Bellotti II*, 443 U.S. at 635. Restrictions that, if applied to adults, would be unconstitutional may not be invalid when applied to minors. The more profound the decision, the more serious and potentially permanent its consequences, the more applicable this principle. The abortion decision is plainly in this category.

In *Danforth*, Justice White cautioned that traditional rules and methods of constitutional interpretation should not be discarded merely because a case before this Court concerns abortion. *Danforth*, 428 U.S. at 98 (White, J., dissenting). Similarly, in the present case, this Court's traditional recognition that minors' rights are not co-extensive with adults' rights and its corresponding recog-

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[62] *See also* Comment, *The Supreme Court is Undecided on Parental Notification Requirement for Minor's Abortion*, 31 S.C.L. Rev. 604, 610 (1980) ("the state has broader authority to regulate the activities of children than of adults").

nition that states have considerable latitude to restrict the freedom of minors must not be lost simply because this case also involves abortion. Indeed, as this brief points out *supra*, the nature of the abortion decision argues in favor of a parental notification requirement rather than against it.

C. Notification Is Fundamentally Different Than Consent

It is well-settled that requirements of parental notification and of parental consent are fundamentally different. In *H.L. v. Matheson*, 450 U.S. 398, 411 n.17 (1981), Chief Justice Burger wrote for this Court that "in [*Bellotti II*], however, we expressly declined to equate notice requirements with consent requirements."

The constitutional significance of this distinction for purposes of the present case is that the defect identified by this Court which has warranted its invalidation of consent statutes is not present in the case of notification statutes. The absolute "veto" nature of the obstacle imposed by a consent statute is the critical constitutional defect and the reason this Court has invalidated those provisions. *See Danforth*, 428 U.S. at 75; *Bellotti II*, 443 U.S. at 639 (Court held in *Danforth* that state cannot authorize "an absolute parental veto"); *Matheson*, 450 U.S. at 411 (notice statute "gives neither parents nor judges a veto power over the minor's abortion decision"). Indeed, the Court of Appeals in the present case stated that the parental consent provision at issue in *Danforth* "was constitutionally defective because it gave a third party an absolute right to veto the decision." *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852, 857 (6th Cir. 1988).

Minors' rights are different than adults' rights and cases involving them should accordingly be approached in a different way. Likewise, notification is different than consent and cases involving each kind of regulation must

be approached differently. A notification requirement like that in the Ohio statute on review in this case simply does not contain the constitutional defect, the "absolute obstacle," [63] identified by this Court in parental consent requirements which warrants striking down a parental involvement statutory provision.

D. Consultation Is Different Than Veto

The function, as well as the constitutional significance, of notification requirements is different than that of consent statutes. Notification serves to promote consultation between parents and their children—with the goal of improving the minor's abortion decision and the relationship between parent and child—while consent serves to transfer the location of decision making. Notification directly addresses at least two of the three concerns identified by this Court as limiting the extent of minors' constitutional rights: their inability to make critical decisions in an informed and mature manner, and the "guiding role" of parents in bringing up their children. As such, a notification requirement is particularly important in serving the significant interest of protecting adolescents.

A state may limit the freedom of minors to make important decisions. The necessary constitutional inquiry, of course, must focus on the permissible scope of "limit." This Court has clearly stated that this power does not extend to granting "an absolute, and possibly arbitrary, veto" over a pregnant minor's abortion decision. *Danforth*, 428 U.S. at 74. Nevertheless, recognizing the significance and constitutionally protected nature of the parent/child relationship, the various sound reasons why

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[63] *Planned Parenthood v. Danforth*, 428 U.S. 52, 70 n.11 (1976). While the Court used this label to describe the constitutional defect in the spousal consent requirement of the Missouri statute under review in that case, it also expressly held that the same principle applied to its evaluation of the parental consent requirement.

minors' constitutional rights are not co-extensive with those of adults, and the broader latitude of the state in regulating or limiting the freedom of minors, this Court must uphold this statutory provision. Refusing to do so in this case would render these principles from this Court's other cases nugatory, reducing the state's role in this important area to one of mere suggestion or less. The states would retain no power to actually accomplish what has traditionally been their vital function—protecting their young citizens. The various important interests at stake in this particular context mean that the state can require at least something minimal like notification.

E. This Court Has Upheld a Parental Notification Requirement

In fact, this Court has acknowledged the validity of the argument just presented. In addition to the state's interest in protecting adolescents and the difference, both in function and constitutional significance, between notification and consent, this Court has identified parental consultation itself as "particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns." *Bellotti II*, 443 U.S. at 640. These factors in combination led this Court in *Matheson* to uphold a parental notification statute.

In *Matheson*, this Court upheld application of the Utah parental notification statute to a class of unemancipated dependent minors who had made no showing of their maturity. In so doing, the Court made a crucial observation: "There is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion." *Matheson*, 450 U.S. at 408. The evidence and research on adolescent psychology reviewed in this brief demonstrate that all adolescents can benefit from a requirement of parental notification. Even so, the statute presently on

review before this Court is more narrowly tailored and by its very terms applies to unemancipated minors.

CONCLUSION

The district court below relied on *Matheson* and accurately stated what a decision invalidating the Ohio statute on review here would do to that precedent. Judge Aldrich explained that "the notification procedure which the Supreme Court explicitly upheld for some minors in *Matheson* would be an empty formalism with no practical effect if the abortion could proceed before the parental consultation could take place." *Akron Center for Reproductive Health v. Rosen*, 633 F.Supp. 1123, 1139 (N.D. Ohio 1986).

The Court of Appeals in this case recognized that the Ohio statute under consideration "requires only parental notification" and does not require consent. *Akron Center for Reproductive Health v. Slaby*, 854 F.2d at 860. Yet the court below disregarded the constitutionally significant distinction between notice and consent provisions, the functional difference between parental consultation and veto, and this Court's own recognition that "[the state] may . . . determine, as a general proposition, that [parental] consultation is particularly desirable with respect to the abortion decision." *Bellotti II*, 443 U.S. at 640.

In an area like parent/child relations that has traditionally been left as a matter of state law, and in recognition of the various principles outlined in this brief, this Court should resist the temptation to impose a constitutional rule which splits adolescents from their parents when they need them most. Such a conclusion would be based on something far less than the searching, candid examination and application of this Court's principles concerning minors and the evidence on adolescent psychology that America's youth deserve. They deserve honest recognition of their needs, not platitudes and

cliches about their supposed "fundamental rights." In a society with pressures that bear so heavily on them, America's youth need encouragement to consult their parents, not a secret lift to the abortion clinic. The Constitution of the United States does not mandate the division of families or the isolating of young women from the sound and loving advice of their parents, only to be a victim of the unsound words of friends or the self-serving words of those who sell abortions.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 88-805

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October Term, 1989

STATE OF OHIO

Appellant

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH

Appellee

On Appeal From the United States Court of Appeals for the Sixth Circuit

BRIEF OF JEROME S. LUEBBERS, FOR HIMSELF AND 61 OTHER MEMBERS OF THE OHIO GENERAL ASSEMBLY AS *AMICI CURIAE* IN SUPPORT OF APPELLANT, STATE OF OHIO

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TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of the Amici Curiae 1

Summary of Argument 3

Argument 7

I. THE COURT BELOW FAILED TO GIVE DUE DEFERENCE TO THE STATE LEGISLATIVE ROLE IN FORMULATING PUBLIC POLICY AND IN PARTICULAR TO THE STRONG POLICY OF PROTECTING AND FOSTERING FAMILY RELATIONSHIPS 7

II. THE JUDICIAL BYPASS PROCEDURE PERMITTING A MINOR TO AVOID THE REQUIREMENTS OF PRIOR PARENTAL NOTIFICATION OF HER ABORTION IS WELL WITHIN THE DUE PROCESS REQUIREMENTS OF THE UNITED STATES CONSTITUTION 13

A. The requirement of a clear and convincing standard of proof fairly allocates the interests of the state, the minor and her parents, and assures that the policy underlying the parental notification requirement will not be ineffectual 13

B. The time required for judicial determination of a petition for bypass is expeditious, not contrary to precedent, and not unduly burdensome upon the right to seek an abortion 19

Conclusion 25

TABLE OF AUTHORITIES

Page

CASES

Addington v. Texas, 441 U.S. 418 (1979) 18

Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988) 9, 10, 25

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (*Akron I*) 10, 24

American College of Obstetricians and Gynecologists v. Thornburgh, 656 F. Supp. 879 (E.D.Pa. 1987) ..20, 23

Bellotti v. Baird, 443 U.S. 622 (1979) (*Bellotti II*) 15, 21, 22

First English Evan. Luth. Ch. v. Los Angeles Cty., 107 S.Ct. 2378 (1987) 8

Frisby v. Schultz, 108 S.Ct. 2495 (1988) 8, 9, 21, 23

Ginsburg v. New York, 390 U.S. 629 (1968) 9

Glick v. McKay, 616 F. Supp. 322 (D.C.Nev. 1985) 20

Granny Goose Foods, Inc. v. Brotherhood of Teamster & Auto Truck Drivers, 415 U.S. 423 (1974) 20

Gregg v. Georgia, 428 U.S. 153 (1976) 8

H.L. v. Matheson, 450 U.S. 398 (1981) 10, 11

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 8

Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986) *rev'd*, 853 F.2d 1452 (8th Cir. 1988) (en banc), *cert. granted*, 109 S.Ct. 3240 (1989) 16

In re Custody of Smelser, 22 O.Misc. 41, 257 N.E.2d 769 (1969) 19

Indiana Planned Parenthood Affiliates Assoc. v. Pearson, 716 F.2d 1127 (7th Cir. 1983) 10

TABLE OF AUTHORITIES - Continued

Page

Johnson v. Adams, 18 Ohio St. 3d 48, 479 N.E.2d 866 (1985) 19

Lassiter v. Department of Social Services, 452 U.S. 18 (1981) 16

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) 22

Mathews v. Eldridge, 424 U.S. 319 (1976) 13

Meyer v. Nebraska, 262 U.S. 390 (1923) 14

New Orleans v. Dukes, 427 U.S. 297 (1976) 8

New State Ice Co. v. Liebman, 285 U.S. 262 (1932) 7

Parham v. J.R., 442 U.S. 584 (1979) 18

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 8

Planned Parenthood of Atlanta v. Harris, 670 F. Supp. 971 (N.D.Ga. 1987) 20

Planned Parenthood of Central Missouri v. Ashcroft, 462 U.S. 476 (1983) 20, 22, 23

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 10, 14

Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944) 8, 14

Quilloin v. Walcott, 434 U.S. 246 (1978) 14

Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978) 8

Roe v. Wade, 410 U.S. 113 (1973) 14, 24

Rose v. Rose, 16 Ohio App. 2d 123, 242 N.E.2d 677 (1968) 19

TABLE OF AUTHORITIES – Continued

Page

Santosky v. Kramer, 455 U.S. 745 (1982) ..... *passim*

Schenley v. Kauth, 160 Ohio St. 109 (1953) 20

Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) 8

Stanley v. Illinois, 405 U.S. 645 (1972)..... 14

United States v. Carolene Products Co., 304 U.S. 144 (1938) 7

United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984) 23

United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095 (1987) 8, 21

Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989) 8, 9, 21, 24

Wisconsin v. Yoder, 406 U.S. 205 (1972)..... 14

OTHER AUTHORITIES

Note, *H. 319: Ohio Adopts an Abortion Notification Statute*, 12 U. Dayton L. Rev. 205 (1986) 17

Ohio Revised Code § 2151.85 ..... 9, 13, 14, 15, 20

Ohio Revised Code § 2505.073 ..... 9, 15, 20, 21, 23, 24

Ohio Revised Code § 2919.12 ..... 9, 10, 15, 24

Rule 65, F.R.C.P. 20

Rule 65, O.R.C.P. 20

INTEREST OF THE AMICI CURIAE

The elected individual members of the General Assembly of the State of Ohio, whose names appear below, are legislators charged with the responsibility for formulating public policy according to the law and the Constitutions of the United States and of the State of Ohio. Upon entering office, each took one of the following solemn oaths.

> I, [name], do solemnly swear to support the Constitution of the United States and the Constitution of the State of Ohio, and I will faithfully, honestly, and impartially perform all duties incumbent upon me as state representative, so help me God.
>
> I, [name], do solemnly swear to support the Constitution of the United States, and the Constitution of the State of Ohio, and faithfully to discharge and perform all of the duties incumbent upon me as an officer of the Ohio Senate according to the best of my ability and understanding; and do this as I shall answer unto God.

Sensitive to our role in the federal system, it is our duty and interest to craft laws that further the public policy of the State of Ohio in a manner that is effective and in harmony with the requirements of the United States Constitution. When a lower court fails to perceive the intensity of the state interest in formulating and furthering a particular public policy – in this case, the stability of family relationships – it is necessary for all the actors in our federal system that that error be corrected.

In this case, we urge this Court once again to affirm the role of the states in our federal system, particularly in their traditional concern for the health and stability of the

family. We seek to apprise the Court of the carefully constructed provisions of the parental notification statute before it, and, in particular, of the manner in which all relevant interests are accounted for within the bounds of due process. Finally, we ask this Court to affirm respect for the judicial processes of the state court system, upon which is placed the trust of enforcing the laws of the State of Ohio in a manner consistent with justice and the rights of all parties before it.*

AMICI

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Rep. Rod H. Hughes
Rep. Troy James

*Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

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Rep. Thomas Johnson
Rep. Jerry Krupinski
Rep. Jerome F. Luebbers
Rep. Mark A. Malone
Rep. Harry C. Malott
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Rep. Dwight Wise
Sen. Alan Zaleski

SUMMARY OF ARGUMENT

It is an axiom of our constitutional system that the states are a necessary and integral part of our fundamental order and that the exercise of the state's police power should be accorded great deference. Even when it is asserted that a statute intrudes upon a fundamental constitutional interest, federal courts are careful to accord respect to the state's legislative authority.

A statute must be construed to avoid constitutional impediments, if it can fairly be done. Furthermore, on facial attacks, courts are obliged not to speculate unduly on possible constitutional faults not plainly on the face of

the statute. The court below failed these basic canons of deference and statutory interpretation.

The Ohio parental notification statute is crafted to insure that the fundamental constitutional interests of both the family and child are respected in this most emotional and morally charged decision. The fundamental privacy interest of the minor is preserved. The statute does not operate as a veto on the minor's choice to obtain an abortion. There is but a 24 hour pause after notification before the minor may proceed with her decision.

In addition, the bypass procedures are fully within the due process requirements of the United States Constitution. The standard of proof fairly allocates the risk of error between the minor, the parents and the state. The procedure itself is expeditious. It contains mechanisms of constructive authorization and allows for an even speedier resolution for the benefit of the minor.

The court below demonstrated a virtual absence of understanding and respect for the state policy in furthering the family bond. It ignored a long-settled and currently vibrant tradition, established by this Court, in the fundamental liberty interest of the family in the care, custody, and upbringing of the child. The court also overstated the possible infringement on the child's privacy interest in this statute.

The statute's central purpose lies in furthering the interrelated interests of parent and child. Notification of the minor's imminent abortion allows parents to exercise

their constitutionally guaranteed rights of care and concern. These same rights operate on the child's behalf as well. Parents are able to provide vital information on the medical history of the minor. They have the opportunity to seek out the advice of a trusted physician, or the have the abortion done by a physician they know and have confidence in. They can be alert to possible post-abortion symptoms, and assist in mitigating the stress that may accompany the decision both before and after the event.

Even if notified parents seek to dissuade a child from following through with the procedure, the child is not prohibited thereby. The right of the parent to moral concern, and indeed, to moral teaching is fundamental to the constitutionally recognized role of the family. In acknowledging that right, the state advanced the child's own interest in the family bond, while not infringing on her privacy interest to choose as she may.

The statute allows a minor to avoid notification by demonstrating to a juvenile court that she is mature or that it would be in her best interests not to have her parents notified. Because the proceeding is *ex parte*, the state utilizes the clear and convincing standard of proof to minimize the risk of factfinding error. Should an immature minor erroneously be given permission not to notify her parents of the abortion, the liberty interest of the parent to care, custody, and nurture is infringed to the detriment of the child as well. Should a court erroneously require a mature minor to notify her parents, her right to the abortion is not unduly burdened, for she retains the prerogative to proceed on her own after only 24 hours.

Statistics indicate that, without the protection of a clear and convincing standard of proof, bypass procedures can operate as a more or less automatic pass-through of petitions not to notify a parent. By adopting the clear and convincing standard, the risk of error to the respective vital interests is minimized.

The bypass procedure itself is expeditious, not contrary to precedent, and not unduly burdensome on the minor's right to seek an abortion. The possibility of a twenty-two day process, emphasized by the court below, will rarely, if ever, take place. The statute requires judges personally to hear the complaint at the earliest possible time and to render a decision immediately. It has a mechanism of automatic authorization should there be a delay, and has additional means of condensing the process. Under modern medical practice, the period of time for the bypass procedure to be completed does not carry with it any significant medical risk to the minor. The possibility of the pregnancy being pushed up to or beyond the first trimester line, emphasized by the court below, is no longer medically or constitutionally significant. The statute itself provides for protection of the minor by allowing an accelerated process at any time a delay might impose a health or other burden on the minor.

The statute, therefore, creates an admirable mix of procedural mechanisms that takes into account the fundamental constitutional interests of both parent and child. The law is driven by a concern for the child's welfare in that it recognizes and furthers the fundamental constitutional interest in the care, custody, and nurture of the

child by the family, as well as permitting the child the undeniable option of obtaining an abortion, should she so choose. The family's fundamental constitutional rights are assisted, while the minor's fundamental privacy interest is not unduly burdened. The statute should be upheld, the court below reversed.

ARGUMENT

I. THE COURT BELOW FAILED TO GIVE DUE DEFERENCE TO THE STATE LEGISLATIVE ROLE IN FORMULATING PUBLIC POLICY AND IN PARTICULAR TO THE STRONG POLICY OF PROTECTING AND FOSTERING FAMILY RELATIONSHIPS

It is an axiom of our constitutional system that the states are a necessary and integral part of our fundamental order and that the exercise of the state's police power should be accorded great deference. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Deference to the state, however, does not hold where the state, in the exercise of its police power, plainly intrudes upon a fundamental federal or constitutional interest. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). Nonetheless, the finding of a constitutional violation is not casually done. Respect due to the state legislative process remains and is reflected in a number of principles that guide the federal courts when confronting a claim that a state law has infringed upon a fundamental constitutional interest.

In adjudicating a facial challenge to a statute's constitutionality, a court has a dual duty of care. It must first interpret the statute so as "to avoid constitutional difficulties." *Frisby v. Schultz*, 108 S.Ct. 2495, 2501 (1988). Second, it must be established "that no set of circumstances exists under which the Act would be valid. The fact that the [relevant statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3060 (1989) (O'Connor, J., concurring), quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100 (1987).

Furthermore, some interests of the state are accorded special deference.[1] In particular, the Supreme Court has long regarded the family as a vital and special concern of the states. In *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944), the Court stated, "It is cardinal with us that the custody, care, and nurture of the child reside first with the parents, whose primary function and freedom include preparation for obligations that the state can

[1] *See, e.g., New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (regulation of local economies); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970), quoting *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 796 (1945) (Douglas, J., dissenting) ("state regulation in the field of safety"); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443 (1978) (highway safety regulation); *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (the specification of punishments under state criminal law); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984) (" public use" determination in state takings of property); *First English Evan. Luth. Ch. v. Los Angeles Cty.*, 107 S.Ct. 2378, 2398 (1987) (zoning and land use development).

neither supply nor hinder." In applying this principle, the Court in *Ginsburg v. New York*, 390 U.S. 629 (1968), declared, "The legislature could properly conclude that parents and others, teachers, for example, who have this primary responsibility for children's well-being are *entitled to the support of laws designed to aid discharge of this responsibility.*" *Id.*, at 639 (emphasis added).

Ohio's parental notification statute[2] fully considers the constitutional interests of both the parents and the child. There is nothing plainly on the face of the statute that indicates otherwise. The court below nonetheless found a number of procedural aspects of the statute faulty. *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852, 861-68 (6th Cir. 1988). In reaching that conclusion, the court failed to give sufficient recognition "that the parents' claim to authority in their own household to direct the rearing of their children is basic to society," *Ginsburg, supra*, at 639, and to the "fundamental liberty interest of natural parents in the care, custody, and management of their child." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). The court also erred in adopting a method of statutory interpretation that was not designed "to avoid constitutional difficulties," *Frisby, supra*, at 2501, and in unduly speculating about possible constitutional violations not evident on the face of the statute. *Webster, supra*, at 3060 (O'Connor, J., concurring).

The court below admitted that, under the Ohio parental notification statute, "the threat of an absolute veto

[2] Ohio Amended Substitute House Bill 319 (H.B. 319), enacted as Ohio Revised Code §§ 2151.85 and 2505.073 and amending Ohio Revised Code § 2919.12.

[to a minor's obtaining an abortion] is arguably absent." *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852, 860 (6th Cir. 1988). There is, in fact, no right under the Ohio law for a parent to void the decision of the minor to abort. *Cf. Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). Even after notification, the minor need wait but 24 hours before effectuating her decision. O.R.C. § 2919.12(B)(1)(a)(i). Nonetheless, the Court of Appeals presumed that if any aspect of the bypass procedures of the Ohio statute failed, it could expose a mature minor to hostile and constitutionally prohibited parental involvement. 854 F.2d, at 861, citing *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 441 n. 31 (1983) (*Akron I*). *See also Indiana Planned Parenthood Affiliates Assoc. v. Pearson*, 716 F.2d 1127 (7th Cir. 1983).

To begin with, it is an unjustified assumption that parents would necessarily oppose the decision of a minor to obtain an abortion. There are many appropriate reasons, outside of approval or disapproval, why notification serves the interests of the child and the family relationship.

Parental notification of the abortion decision is important in protecting the child's well-being both before and after the decision is made. As the Court recognized in *H.L. v. Matheson*, 450 U.S. 398, 411 (1981), parents who have prior notice "can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and to authorize family physicians to give relevant data." As with other elective surgical procedures, the notified parent may wish his or her child to obtain an abortion from a trusted family

physician or from one that the physician may recommend; or the family may have particular health insurance requirements that need to be considered. Parents can also be properly attentive to the child's physical and mental health during the stressful period when the abortion decision is made.

The value of parental notification continues after the abortion decision. If a decision to abort is made, knowledge that an abortion has occurred is crucial to the proper exercise of the parent's duties with respect to the child's well-being. As was indicated in *Matheson*, an abortion can have "medical, emotional, and psychological consequences" that are "serious and can be lasting." 450 U.S., at 411 n. 20. The Court also noted that these complications are more common in minors than in adults. A conscientious parent who is aware that a minor has had an abortion can be especially observant for signs of physical or psychological complications and can respond promptly to protect the minor's health. Parents can also provide understanding and counsel should there be a period of distress following the abortion.

In contrast, a parent who is unaware that an abortion has occurred will be less likely to recognize or to interpret accurately possible symptoms early enough to obtain medical or psychological attention which could prevent more serious problems. Indeed, if the minor is intent on concealing the abortion from the parent, she may even attempt to conceal symptoms from the parent and delay seeking medical attention. Finally, as will happen in many cases, finding out that their child has had an abortion after the fact can be an even greater shock to the parents and a profound wound to the family relationship.

Against these real concerns is posited the speculative proposition that a parent might pressure a minor to forego an abortion. Of course, it can be expected that in some cases – how many one does not know – parents will attempt to dissuade their child from having the abortion. They may do so for any number of reasons, including moral concerns. But this is the essence of a parent's right. If, under Ohio law, the minor remains legally free to choose an abortion, the parent must likewise retain the right of moral instruction. To deny a parent that right goes against the Court-sanctioned tradition of what constitutes family relationships, and results in a court-sanctioned censorship intruding into the very heart of the parent-child relationship. Moral discourse about teenage sexuality, adult relationships, and abortion, both before and after the minor becomes pregnant, is what one would expect and hope for from parents. Certainly an "unfettered" right to an abortion cannot mean a right unfettered by moral concerns expressed by those who have the right to express those moral concerns. That is all the Ohio statute has done. It retains the right of a minor to have an abortion, and makes sure the parent receives accurate information so that the parent may exercise appropriate rights of medical, psychological, and moral concern and suasion. The state policy is well deserving of respect and deference.

II. THE JUDICIAL BYPASS PROCEDURE PERMITTING A MINOR TO AVOID THE REQUIREMENTS OF PRIOR PARENTAL NOTIFICATION OF HER ABORTION IS WELL WITHIN THE DUE PROCESS REQUIREMENTS OF THE UNITED STATES CONSTITUTION

A. The requirement of a clear and convincing standard of proof fairly allocates the interests of the state, the minor and her parents, and assures that the policy underlying the parental notification requirement will not be ineffectual

Under the Ohio parental notification law, an unmarried unemancipated minor may avoid notice to her parents of her imminent abortion by demonstrating to a court by clear and convincing evidence that she is mature or that an abortion without notification is in her best interests. O.R.C. § 2151.85. Even presuming a fundamental constitutional interest in obtaining an abortion without parental notification, the clear and convincing standard of proof satisfies the dictates of due process by correctly balancing the interests involved.

In judging the appropriateness of a burden of proof standard, the Court has delineated three factors: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing government interest supporting use of the challenged procedure." *Santosky, supra,* at 754, citing *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). In its decision, the court below failed to appreciate the extent of the parental interests involved in the bypass procedure, and

thus mischaracterized the risk of error affecting the interests of the parent and the minor. 854 F.2d, at 863-64.

Two private interests are affected by the waiver of the parental notice requirement: that of the parent and that of the minor. As discussed above, this Court has long recognized the "fundamental liberty interest of natural parents in the care, custody, and management of their child." *Santosky, supra,* at 753. In *Quilloin v. Walcott,* 434 U.S. 246 (1978), the Court declared that "the relationship between parent and child is constitutionally protected." *Id.,* at 255, citing *Wisconsin v. Yoder,* 406 U.S. 205, 231-33 (1972); *Stanley v. Illinois,* 405 U.S. 645 (1972); *Meyer v. Nebraska,* 262 U.S. 390, 399-401 (1923).

A failure to provide parental notification seriously impairs the fundamental interest of the parents in the care, custody and management of their child. It prevents the parents from exercising their primary function and freedom to prepare their child "for obligations the state can neither supply nor hinder." *Prince, supra,* at 166. It prevents the parents from providing essential medical, psychological and other data important to the physician. *Matheson, supra,* at 411. It prevents the parents from providing the mature advice and emotional support needed to make a decision of such grave consequences. *Danforth, supra,* at 91.

In point of fact, the procedural requirements of O.R.C. § 2151.85 promote both the fundamental liberty interest of the parents and the minor's right of privacy as articulated in *Roe v. Wade,* 410 U.S. 113 (1973). A minor, seeking to avoid the parental notice requirement, has her

petition heard before the juvenile court, a court experienced and competent to determine maturity and the best interests of the minor. O.R.C. §§ 2151.85(A)(4)(a) and (b). Should the court decide against her petition, the petitioner has a right of expeditious appeal. O.R.C. § 2505.073. Even when parental notification takes place, parental consent is not required, and the minor, after twenty-four hours, is free to exercise her option to have an abortion. O.R.C. § 2919.12(A)(1)(a)(i).

The objective of the statute along with the level of proof it requires is to minimize the risk of erroneous decision against both private interests. An erroneous determination by a court that prevents parental notification will deprive the parents of their fundamental liberty interest in the care, custody and management of their immature child. The Court, in *Bellotti v. Baird,* 443 U.S. 622 (1979) (*Bellotti II*), was aware of the risk of serious impairment to the welfare of the child if parental involvement is prevented.

> [P]arental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision – one that for some people raises profound moral and religious concerns.
>
> 443 U.S., at 640 (footnotes omitted).

On the other hand, an erroneous determination that results in parental notification may, at the most, hinder the mature child in her exercise of the right of privacy, but it does not deprive her of that right. It is therefore important, where possible, to minimize the risk of an erroneous determination that would prevent parental notification.

In examining the risk of error under the clear and convincing standard of proof in the judicial bypass procedure, it is important to recall the state's interest in parental notification. The *parens patriae* interest of the state in promoting the welfare of the child favors maintenance of the family relationship and requires a high burden of proof to sever it. Thus, the state " 'shares the parent's interest in an accurate and just decision' at the *factfinding* proceeding." *Santosky, supra,* at 766, quoting *Lassiter v. Department of Social Services,* 452 U.S. 18, 27 (1981).

In Ohio, the judicial bypass procedure that enables a minor to avoid parental notification on a showing of maturity or best interest is an *ex parte* proceeding. The minor may file a complaint seeking to avoid parental notification without any interested party to defend the interests of the parents or the state. This proceeding raises a serious risk of erroneous factfinding. In fact, judicial bypass proceedings with less than a clear and convincing standard of proof almost invariably end in a bypass. In *Hodgson v. Minnesota,* 648 F. Supp. 756 (D. Minn. 1986), *rev'd,* 853 F.2d 1452 (8th Cir. 1988) (en banc), *cert. granted,* 109 S.Ct. 3240 (1989), the parties submitted statistics on bypass petitions filed in Minnesota to avoid parental notification from August 1, 1981 to March 1,

1986. During that period 3,558 of 3,573 bypass petitions were granted, 6 were withdrawn and 9 were denied. 648 F. Supp., at 765. Similar results have occurred in Massachusetts and Rhode Island with bypass petitions to avoid parental consent. Note, *H. 319: Ohio Adopts an Abortion Notification Statute,* 12 U. Dayton L. Rev. 205, 236-37 (1986).

A clear and convincing standard of proof is one means of acknowledging the *ex parte* nature of the proceeding to insure that due care is afforded to the evaluation of the waiver request. Without it, there is a danger that the bypass procedure might erroneously operate as a more or less automatic pass-through of petitions for waiver. The effect of such erroneous decisions on the parents' fundamental interests could be devastating.

Furthermore, an erroneous determination to allow a bypass of parental notification abrogates these significant, compelling and fundamental interests of the state and parents in a situation that is *final and irreversible.* The finality of this situation is an important consideration in permitting a higher standard of proof than "preponderance of the evidence." In *Santosky,* this Court stated that "the private interest affected [by a final and irrevocable termination of parental rights] – weighs heavily against use of the preponderance standard." 455 U.S., at 759. Therefore, because the interests on the side of the parents and the state are fundamental, significant and compelling, the accuracy of an irreversible factfinding process that protects these interests can best be assured by requiring the minor to prove maturity or her best interest by clear and convincing evidence.

On the other hand, if the bypass proceeding makes an erroneous determination in favor of parental notification, the result will not be an abrogation of the minor's right to an abortion. Under Ohio law, that right is protected against the veto of the parent. A minor after notification still has the power to obtain an abortion even against the wishes of her parent. With these considerations in mind, the legislature of the State of Ohio reached a rational "societal judgment about how the risk of error should be distributed," *Santosky, supra,* at 755, in this case, between the minor and the parents. *See also Addington v. Texas,* 441 U.S. 418, 423-24 (1979).

At bottom, however, the choice is not between incompatible constitutional rights of parent and child under the Ohio law. Whatever the result, the basic liberty interest of the child is preserved, and the exercise of the fundamental liberty interest of the parents in the care, custody and management of their child can benefit the child in the exercise of her freedom to obtain or forego an abortion. In fact, parental notification not only leaves the minor with the power to exercise her freedom to obtain an abortion, but it can also help her to exercise that freedom in an informed and responsible manner. In *Parham v. J.R.,* 442 U.S. 584, 602 (1979), Chief Justice Burger stated:

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Although the child may initially seek to resist the family relationship – perhaps for reasons of immaturity, peer pressure, or lack of knowledge and experience – that family bond is one that the state properly seeks to preserve by means of a clear and convincing standard of proof.[3]

B. The time required for judicial determination of a petition for bypass is expeditious, not contrary to precedent, and not unduly burdensome upon the right to seek an abortion

The Court of Appeals below calculated that a minor might have to wait a maximum of twenty-two days before the final judicial determination of her petition to avoid having to notify her parents of her decision to abort. 854 F.2d, at 866. We assume, for purposes of argument, that the twenty-two day count is accurate, for we do not think it is of any greater constitutional significance

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[3] The standard of clear and convincing evidence is not unusual in the determination of family matters under Ohio law. A presumption in favor of maintaining the family relationship pervades the law in this area. Clear and convincing evidence is needed to overcome the presumption that a minor child born during wedlock is the child of the husband. *Rose v. Rose,* 16 Ohio App. 2d 123, 242 N.E.2d 677 (1968). This includes the case where a man marries a woman while she is still pregnant. *Johnson v. Adams,* 18 Ohio St. 3d 48, 479 N.E.2d 866 (1985). There is a presumption in favor of the fitness of every person to have custody of his or her child. *In re Custody of Smelser,* 22 O.Misc. 41, 257 N.E.2d 769 (1969).

than a sixteen day process would be. *See Planned Parenthood of Central Missouri v. Ashcroft*, 462 U.S. 476, 491 n. 16 (1983).[4]

To begin with, the statute is constructed so that the full maximum waiting period purported by the court below will rarely, if ever, take place. At the critical hearing level, the judge is required to hear the case personally "at the earliest possible time" and to "enter judgment immediately after the hearing is concluded." If the judge be dilatory, waiver is automatically authorized for the minor after five business days. O.R.C. § 2151.85(B)(1). A similar automatic provision applies should a Court of Appeals delay its judgment. O.R.C. § 2505.073(A).[5]

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[4] Lower courts have differed as to whether a bypass procedure approximating or exceeding twenty-two days is unconstitutional. *Planned Parenthood of Atlanta v. Harris*, 670 F. Supp. 971, 990 (N.D.Ga. 1987) (twenty-three day bypass constitutional under a notification statute); *American College of Obstetricians and Gynecologists v. Thornburgh*, 656 F. Supp. 879, at 888 (E.D.Pa. 1987) (twenty-three day maximum bypass unconstitutional under a parental consent statute); *Glick v. McKay*, 616 F. Supp. 322 (D.C.Nev. 1985) (three week process raises serious questions of constitutionality under a parental notification statute). The issue has not yet been decided by this Court.

[5] The court below mistakenly concluded that the constructive authorization provisions of the statute left the minor "with nothing tangible to show the physician in support of her authority to proceed. . . ." 854 F.2d, at 868. It is settled law in Ohio that a court speaks only through its journal. *Schenley v. Kauth*, 160 Ohio St. 109, 111 (1953). Reliance on the absence of an entry is a basic principle known also in real property law and in *ex parte* actions under the Federal and Ohio Rules of Civil Procedure. *See* Rule 65, F.R.C.P.; Rule 65, O.R.C.P.; *Granny Goose Foods, Inc. v. Brotherhood of Teamster & Auto Truck Drivers,*

(Continued on following page)

In addition, the statute requires that, in the interests of justice, the Court of Appeals "shall liberally modify or dispense with" the formal briefing requirements, and may, for good cause, shorten or extend the periods of time stated in the law. O.R.C. § 2505.073(A). Filing fees and court costs, and the consequent delay in obtaining, delivering and receiving those funds, are also dispensed with. *Id.*

It is evident that the statute has a significant number of protections against undue delay. Consequently, the Court of Appeals overreached itself in finding a constitutional infirmity merely because of the possibility of a twenty-two day waiting period. By doing so, that court ran "afoul of the well established principle that statutes will be interpreted to avoid constitutional difficulties." *Webster, supra*, at 3054, quoting *Frisby, supra*, at 2501. It also engaged in undue speculation, inappropriate to adjudicating a facial challenge to a statute. *United States v. Salerno, supra*, 481 U.S., at 745, 107 S.Ct., at 2100.

Even if a twenty-two day waiting period could take place, it would not contravene the precedents of this Court. The plurality opinion in *Bellotti II* requires that a bypass procedure be sufficiently expeditious "to provide

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(Continued from previous page)

415 U.S. 423, 445 (1974). The constructive authorization provisions in the Ohio parental notification law operate in the same fashion. The minor and her attorney have due process access to the confidential journal and the docket of her case kept by the juvenile court and to copy the same. In the absence of a journal entry within the time period specified in the statute, the authority to proceed with an abortion without notification to a parent is unambiguously established.

an effective opportunity for an abortion to be obtained." 443 U.S., at 644.[6] In *Ashcroft*, this Court upheld a bypass procedure under Missouri law which the court below in this case described as "spanning sixteen or seventeen days plus . . . a period of sufficient expedition at both the trial level and the appellate level during which the decision would be made." 854 F.2d, at 867. It was not certain how long the additional decision-making time could extend the process under the Missouri law, but it could easily approach the twenty-two days that the court below fixed as the outer limit of the Ohio procedure.

Yet this Court did not distrust the good faith of the judicial officers of the State of Missouri. It declared, "There is no reason to believe that Missouri will not expedite any appeal consistent with the mandate of our prior decisions." 462 U.S., at 491 n. 16. It is remarkable that despite the requirements in the Ohio statute for expedited procedure even more condensed than what the maximums permit, the opinion below has so little regard for the state courts of Ohio abiding by the requirements of the law and the previous decisions of this Court.[7]

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[6] It should be recalled that *Bellotti II* and *Ashcroft*, the only two decisions of this Court dealing with bypass procedures, both concerned parental consent statutes. The Ohio law only requires notification of a parent or guardian.

[7] In contrast to the Court of Appeals' attitude towards the state judicial system, compare Justice Story's statement even while reversing a state court on the basis of the Supremacy Clause: "[T]he state courts are, and always will be, of as much learning, integrity and wisdom, as those of the courts of the United States, (which we very cheerfully admit). . . ." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 346 (1816).

In comparing the Ohio process with that of Missouri, the court below stated that "in the present case, no such flexibility [for expedition of the process] exists," 854 F.2d, at 867, a conclusion that is manifestly untrue. *See* O.R.C. § 2505.073(A). Normally, great deference is paid "to the interpretation and application of state law by the Courts of Appeals," *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 815 n. 12 (1984). But when the Court of Appeals' interpretation is flatly contradictory to the face of the statute, it has "fallen into plain error" and deference is no longer reasonable. *Frisby, supra*, at 2501. Here again, the Court of Appeals failed this Court's directive restated in *Ashcroft* that "[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." 462 U.S., at 493.

Should the bypass procedure actually run the full twenty-two days, it would not unduly burden the minor's right, under Ohio law, to obtain an abortion. The Court of Appeals noted that over half of abortions performed on minors occur at nine weeks of gestation or later. 854 F.2d at 867, citing *American College of Obstetricians and Gynecologists v. Thornburgh*, 656 F. Supp. 879, 887 (E.D.Pa. 1987). The court below asserted that the danger of a twenty-two day process lay in pushing the pregnancy beyond the end of the first trimester. The argument of the Court of Appeals proves too much. If most abortions on adolescents occur after the ninth week of gestation, a sixteen-day delay would similarly run against the limits of the first trimester in a great number of cases. Yet sixteen days has been held to be sufficiently expeditious. *Ashcroft, supra*, 462 U.S., at 491 n. 16.

There is now adequate authority that the first trimester line in dealing with pregnancy is arbitrary and constitutionally irrelevant. In *Webster*, the plurality stated, "The key elements of the Roe framework – trimesters and viability – are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle." 109 S.Ct., at 3056-57. It is clear that since *Roe*, the trimester lines have become "blurred" so that "the trimester approach is a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context." *Akron I, supra*, at 454, 455 (O'Connor, J., dissenting).

Nine years ago, the Supreme Court recognized that "the safety of second-trimester abortions has increased dramatically." *Akron I, supra*, at 435-36. Without even having to consider the medical advances in safer abortion procedures since that time, we can conclude that any delay to an abortion that extends it beyond the first trimester is no longer medically or constitutionally significant merely because of that fact.

If there be any undue health burden that may arise from a delay, the solution lies within the statute itself. No matter at what time, early or late, after the end of the first trimester or well before it, that a minor seeks the bypass procedure, any delay that might significantly increase the health risk to her would be "good cause" for an appellate court to shorten the maximum times allowable and thus permit a speedy resolution. O.R.C. § 2505.073(A).[8]

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[8] Of course, the physician is permitted at any time to perform the abortion if an "immediate threat of serious risk to the life or physical health" of the minor arises necessitating an immediate abortion. O.R.C. § 2919.12(C)(2).

The legislature of the State of Ohio, in drafting the provisions for bypass of the notification requirement, was careful to include procedures that were in and of themselves expeditious; that permitted shortening of the allowable time for good cause; and that protected the minor against procedural delay. Only the most untoward speculation of possible failures in the operation of the judicial process could conclude otherwise. The procedures are well within the due process requirements of the United States Constitution.

CONCLUSION

Amici respectfully request the Court to reverse the decision of the Court of Appeals in *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988). The Court of Appeals failed to give appropriate recognition to the tradition of deference to state policy in matters of family law. Indeed, the court had nugatory regard for the family's constitutional interests at stake. The court below also failed to follow the rule that courts will not unduly speculate when judging statutes on their face.

The Ohio parental notification statute carefully took account of the respective interests of the minor and of her parents. The bypass provisions fairly allocated the risk of error and provided for expeditious determination well within the requirements of due process. In all respects, therefore, the statute was drawn to protect the minor's

due process rights. We request that the decision below be reversed and the constitutionality of the statute affirmed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 88-805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal From The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICI CURIAE OF FOCUS ON THE FAMILY AND FAMILY RESEARCH COUNCIL, RACHEL ELY, MYOSHI CALLAHAN, TERESA WIBBLESMAN FANGMAN, HOLLY TRIMBLE, LINDA ROSELLI, ANN MARIE LOZINSKI, ROBERT C. WIBBLESMAN, AND AMERICAN VICTIMS OF ABORTION, IN SUPPORT OF APPELLANTS

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51pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. PARENTAL CONSULTATION PROTECTS VULNERABLE ADOLESCENTS AND FAMILIES FROM HARM, IN FURTHERANCE OF LEGITIMATE STATE INTERESTS	4
A. Parental Consultation Promotes Maternal Health In The Pregnant Adolescent By Reducing The Physical And Psychological Risks Of Abortion	5
1. Physical Risks From Abortion	6
2. Mortality Risks From Abortion	8
3. Emotional And Psychological Harms From Abortion	10
B. Parental Consultation Substantially Benefits The Minor's Decision Making Process	13
C. Parental Consultation Helps Protect Vulnerable, Immature Minors From Exploitation	17
D. Parental Consultation Promotes Legitimate Parental Authority And Family Unity	22
1. Parental Control	22
2. Family Involvement	24
II. STATE NOTIFICATION AND CONSENT LAWS ARE RATIONALLY RELATED TO LEGITIMATE STATE INTERESTS AND DO NOT "UNDULY BURDEN" A MINOR'S RIGHT TO HAVE AN ABORTION	25
III. FEDERAL COURTS MUST GIVE GREAT JUDICIAL DEFERENCE TO STATE ABORTION LEGISLATION, PARTICULARLY IN MATTERS INVOLVING PARENT-CHILD RELATIONS	28
CONCLUSION	30
APPENDIX A—Description of Amici	1a
APPENDIX B—The Confused State of Parental Consultation Laws	11a

TABLE OF AUTHORITIES

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Page

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	Page
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INTEREST OF *AMICI CURIAE**

Amici **Focus on the Family** and the **Family Research Council,** representing the concerns of more than 1.7 million American families, have broad experience and interest concerning the impact of abortion on minors and on the family.

Five of the *amici* are women who have suffered severe harm because, as minors, they were allowed—indeed, encouraged—to undergo abortions without the benefit of parental guidance. **Rachel Ely** is now permanently wheelchair-bound; **Myoshi Callahan** has endured severe physical problems, including a hysterectomy; **Teresa Wibblesman Fangman, Holly Trimble,** and **Linda Roselli** each suffered severe emotional anguish and psychological turmoil. These women offer their experiences to the Court to illustrate the very real, practical effect of severing the normal parent-child relationship in the abortion context.

One of the *amici,* **Ann Marie Lozinski,** is the parent of a young woman who suffered the ultimate harm: Debra Lozinski died after two-and-a-half months in a coma, as a direct result of an in-clinic abortion performed without adequate care, and without notice to her parents. Four years later, Debra's mother is still suffering from severe depression.

Amicus **Robert C. Wibblesman,** Teresa Fangman's father, offers a parent's perspective, unique because he has also had the opportunity to help another daughter, faced with an unplanned pregnancy, avoid the pain that Teresa suffered alone.

Many of the individual *amici* are associated with *amicus* **American Victims of Abortion,** which is a national organization of persons whose lives have been adversely affected by abortion.

All of the *amici* have particular knowledge and experience concerning the impact on minors of abortion without parental consultation, which will be helpful to the Court.

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* A full description of the *Amici* appears in Appendix A. This brief is submitted with the written consent of both parties, filed with the Clerk of this Court. *Amici* are concerned with parental notification and consent issues raised in *Ohio* v. *Akron Center for Reproductive Health*, No. 88-805, and *Hodgson* v. *Minnesota*, Nos. 88-1309 and 88-1125, and thus are filing this brief in both cases.

SUMMARY OF THE ARGUMENT

Courts and state legislatures remain uncertain about whether parental consultation laws are constitutional, and if so, within what specific legal parameters. Presently, sixteen parental consultation laws have been enjoined. Only five such statutes have been found constitutional. A clear enunciation that reasonable parental notification and consent laws do not unconstitutionally limit the right to an abortion is needed to permit states to protect minors and their families. Because state legislatures are best suited to provide these protections, the Court should limit its review to whether a statute or regulation is supported by a rational relationship to legitimate state interests.

Many legitimate, if not compelling, state interests are involved in parental consultation laws, particularly when a pregnant teenager is making the difficult and traumatic abortion decision. The courts recognize at least three state interests for parental consultation laws: (1) the peculiar vulnerability of children; (2) minor's inability to make critical decisions in an informed, mature manner; and (3) the importance of the parental role in child rearing. In light of the growing body of scientific evidence about the adverse physical and psychological effects of abortion, parents and the state have an additional and heightened interest in ensuring that the pregnant adolescent is protected from rash, ill-informed or pressured decisions on this traumatic question.

The initial state and parental interest in adolescent pregnancy and abortion is to reduce or eliminate medical and psychological problems of the pregnant minor. Negative medical consequences from abortion include hemorrhage, perforated uterus, subsequent fetal malformation, cervical trauma, ectopic pregnancies, infection, menstrual disturbances, infertility, Pelvic Inflammation Disease (PID), miscarriage and high-risk prematurity in subsequent pregnancies. Since adolescents generally have immature cervixes, researchers have concluded that adverse physical health effects are more common and severe in teenage abortions. Young women who have abortions have also been found to be more predisposed to adverse outcomes in future, planned pregnancies than their sexually mature adult counterparts.

Compared to adults, adolescents appear to also have more negative emotional and psychological responses following abortion. The immediage negative psychological responses include severe guilt, anxiety, depression and psychosis. The long-term adverse psychological effects, which include denial, depression, isolation, alienation, suicide attempts and a family of psychiatric symptoms called Post Abortion Stress (PAS), appear to be more problematic and more devastating for the adolescent aborter.

Parental consultation also enhances a legitimate state interest to help adolescents make better, well-informed decisions about their pregnancy. Parents who have knowledge of a pending abortion can help their daughter assess the medical and psychological risks involved. After consultation, if she still decides to abort, they can relate important medical and psychological information to the abortionist. If adverse complications result, the parents will be aware of the cause and can give important medical information to the subsequent treating physician.

Family involvement in the abortion decision promotes important state interests of family unity and parental control in three ways: (1) it permits the parents to deal with issues underlying adolescent pregnancy; (2) it helps avoid the compounding problems of alienation, isolation and depression, which secret abortions frequently entail; and (3) it provides emotional and psychological support for whatever decision the minors make.

Parental consultation laws clearly have a rational relationship to these legitimate state interests. In addition, consultation laws with a waiting period and a judicial bypass provision cannot be said to unduly burden the minor's abortion right because parents do not have arbitrary, absolute veto power over her decision. After sixteen years, the Court should return to the constitutional principles historically employed in reviewing state health and safety laws, adopt the rational basis standard of review in the parental consultation requirements and jettison the conflicting, intricate set of abortion-related rules that are unrelated to Constitutional doctrine.

ARGUMENT

I. PARENTAL CONSULTATION PROTECTS VULNERABLE ADOLESCENTS AND FAMILIES FROM HARM, IN FURTHERANCE OF LEGITIMATE STATE INTERESTS.

The Court has a prime opportunity to clear up the muddied waters surrounding parental notification and consent which has plagued state legislatures, courts, parents, doctors and pregnant minors for the sixteen years since abortion was legalized in *Roe* v. *Wade*, 410 U.S. 113 (1973). Thirty three states have enacted statutes requiring some form of parental consultation where a minor is considering an abortion. Twenty one states require parental consent and twelve states require parental notification before a minor can obtain an induced abortion. See Appendix B, The Confused State of Parental Consultation Laws. Sixteen parental consultation laws have been enjoined by court action. *Id.* Only thirteen presently in effect have not been challenged in federal court, and only five state statutes have been found to be constitutional. *Id.* Eight Supreme Court decisions have been rendered on this issue with conflicting results. *Id.* The last parental notification case to reach this Court ended in a four to four split; and the *per curiam* decision without opinion offered little guidance to state legislatures. *See Hartigan* v. *Zbaraz*, 763 F.2d 1532 (7th Cir. 1985) *aff'd mem.* 108 S. Ct. 479 (1987). The Sixth Circuit in *Akron Center for Reproductive Health* v. *Ohio*, 854 F.2d 852 (6th Cir. 1988) ("*Akron II*") declared that [*Hartigan*] leaves the principle of law presented by the recent case . . . unsettled." *Akron II*, 854 F.2d at 861.

The effect of unsettled parental consultation law is exacerbated by the unprecedented rise in teenage pregnancies and abortion. Teenage pregnancies, which are most often unwanted, together with teenage abortion, are a national tragedy. In 1981, approximatly 1.3 million teenage pregnancies occurred—a pregnancy rate of 134 per 1000. Henshaw, Binkin, Blaine and Smith, *A Portrait of American Women Who Obtain Abortions*, 17 FAMILY PLANNING PERSPECTIVES 90-96 (1985) (hereinafter "*Portrait*"). Approximately 28% of the 1.6 million abortions each year are performed on teenagers. Centers for Disease Control, U.S. Department of Health and Human Services, Abortion Surveillance (1985). Fifteen thousand pregnancies occurred in girls under age fourteen. *Portrait* at 92. The abortion rate among teenagers has risen sharply with a 60% increase being recorded for all teenagers between 1972 and 1976, and a 120% rise for adolescents under age fifteen. Worthington, *Decision Making in Adolescent Pregnancy* in VALUES AND PUBLIC POLICY 119, 124 (G. Regier Ed., 1988) (hereinafter "Worthington"). Forty five percent (45%) of teenage pregnancies end in abortion. In most cases parents are not even told by their teenagers or notified by doctors. *Portrait* at 93; *see also* Russo, *Adolescent Abortion: The Epidemiological Content* in ADOLESCENT ABORTION: PSYCHOLOGICAL-LEGAL ISSUES 40, 49 (G. Melton Ed., 1986).

Although the legal standards surrounding parental consultation regulations are unsettled, this Court has recognized the important state interests that such laws protect:

> We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Bellotti v. *Baird*, 443 U.S. 622, 634 (1979) ("Bellotti II"). These interests are expanded when viewed against the backdrop of potential harms to teenagers from abortion.

A. Parental Consultation Promotes Maternal Health In The Pregnant Adolescent By Reducing The Physical And Psychological Risks Of Abortion.

The decision to terminate pregnancy involves one of the most complex and difficult decisions of a woman's life. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 67 (1976) ("Danforth"). Medical and psychological risk factors are often overlooked or unknown, and her decision involves other multiple social, economic and moral factors which are further confused by the physiological and psychological changes pro-

duced by pregnancy. Minor women, in particular, are often ill-informed about abortion and its serious ramifications and unable to make mature, rational decisions in their own best interest.

This Court in *H. L.* v. *Matheson*, 450 U.S. 398 (1981) stated:

> The medical, emotional and psychological consequences of an abortion are serious and can be long lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.

Id. at 411.

Numerous scientific studies by independent medical sources confirm the Court's point of view, concluding that induced abortion frequently results in significant, negative and often permanent physical, psychological and social effects on the pregnant woman and her family.

1. Physical Risks From Abortion.

The serious physical complications which have been associated with abortion specifically include: hemorrhaging, cervical trauma, infection, Pelvic Inflammatory Disease (PID), ectopic pregnancy, infertility and subsequent fetal malformations, miscarriages and high risk premature birth in later planned pregnancies and death. *See Amicus Brief* of Focus on the Family in *Turnock* v. *Ragsdale*, No. 88-790, Appendix, Table 1. Researchers who analyze data collected under the auspices of the Centers for Disease Control on Teen Abortion Morbidity and Mortality concluded that women under age eighteen who obtain abortions were more susceptible to physical injury than were older women: "[T]hese findings cause concern because cervical injury in initial, unplanned pregnancies may predispose young women to adverse outcomes in future planned pregnancy . . . [S]ome of the most catastrophic complications occur in teenagers." Cates, Schultz and Grimes, *Risk Associated With Teenage Abortion*, 309 NEW ENGLAND JOURNAL OF MEDICINE 621, 624 (1983). Hence, one abortion decision can impact the entire child bearing potential of a teenage patient.

One abortionist reported on his post-abortion follow up, ranging from two to twelve years, of fifty teenage mothers whose pregnancies he had aborted: "The cervix of the young teenager pregnant for the first time is invariably small and tightly closed and especially liable to damage on dilation." Russel, *Sexual Activity and Its Consequences in the Teenager*, 3 CLINICS IN OB AND GYN 683-698 (1974); *see also* J. Wilke, ABORTION QUESTIONS AND ANSWERS 108-109 (rev. 1988) (hereinafter "ABORTION QUESTIONS"). In fifty-three subsequent pregnancies, he found that six had another induced abortion, nineteen had spontaneous miscarriages, one delivered a stillborn baby at six months, and six babies died between birth and two years. Only twenty one babies survived. Two-thirds of the teenagers subsequently experienced miscarriage or high-risk premature birth of their second wanted pregnancies. *Id.*

From 1974 to 1978, a study was conducted on approximately 84,000 teen abortions performed in Canada which represented 30.9% of all legal abortions. The complications listed from that study were as follows: retained products of the conception (69%); laceration of the cervix (12%); hemorrhage (8%); infection (7%); perforation of the uterus and other complications (4%). The director of the Therapeutic Abortion Unit and the Health Division of Statistics, Canada, acknowledged that there is a high rate of complications (4.1 per 100) in adolescent abortions. Wadhera, *Legal Abortions Among Teens 1974 through 1978*, 122 CAN. MED. ASS. J. 1386-1389 (1980). One Canadian researcher noted:

> Physical and emotional damage from abortion is greater in a young girl. Adolescent abortion candidates are different from their sexually mature counterparts, and these differences contribute to high morbidity. They have immature cervixes and run the risk of difficulty, or potentially traumatic dilatation . . .

ABORTION QUESTIONS at 111-12 (1979) (quoting C. Cowell, *Problems of Adolescent Abortion*, Ortho Panel 14, Toronto General Hospital) (1975).

In 1977, over 100,000 abortion complications were reported in the United States, which is nearly a 10% morbidity rate for immediate and short term complications. D. Reardon, ABORTED WOMEN—SILENT NO MORE 93 (1987) (hereinafter "Reardon"). However, some medical experts believe that these reported morbidity rates from abortion are the "tip of the iceberg," given likely widespread, massive under reporting. *Id.* at 92, 106-109.[1]

2. Mortality Risks From Abortion.

A truly irreversible complication of teenage abortion is death of the mother. Unfortunately, tragic accounts of teenagers dying after an abortion, like the daughter of *amicus* Ann Marie Lozenski, are all too common. *See* Reardon at 109-113, and Appendix A. While statistics are difficult to obtain, it has been reported that in the United States alone, from 1972 to 1981, there were 175 maternal deaths caused by legal abortions, a figure which does not include ectopic pregnancy deaths. Like other post-abortive complications, however, deaths are also grossly underreported. According to one estimate, less than 10% of deaths from legal abortion are reported as such. HANDBOOK ON ABORTION at 80, 98-99.[2]

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[1] The only information available on morbidity comes from voluntary reporting. Since abortion providers want to hide their failures and conceal the fact that legal abortion is not safe, underreporting of abortion complications is the rule rather than the exception. J. Wilke & B. Wilke, *HANDBOOK ON ABORTION* 78-80, 89 (3rd ed. 1979); *see also* Zekman & Warrick, *The Abortion Profiteers*, Chicago Sun Times, November 12, 1978 at 1, Col. 1. In Britain where reporting is much better than the United States, medical experts believe that less than 10% of abortion complications are actually reported to government health agencies. Wynn & Wynn, *Some Consequences of Induced Abortion to Children Born Subsequently*, 4 Marriage and Family Newsletter, 8-9 (1973). "Two meticulous studies in England reveal 35.7% and 36% respectively of aborted women suffer from abortion related physical complications. *Id.* at 17.

[2] Underreporting of abortion deaths and physical complications occur for primarily three reasons: (1) abortionists are seeking to protect their personal and professional reputations; (2) the existence of unfavorable records must be minimized so that abortionists can minimize the availability of damaging evidence in the event of malpractice suits; and (3) abortionists want to maintain the generally accepted myth that abortion is safe. D. Reardon, *ABORTED WOMEN SILENT NO MORE* 90 (1987).

However, even if abortionists were willing to report and the government required accurate statistics, under reporting would still occur for the following five reasons: (1) most out-patient clinics do not provide follow up examinations and thus, without a direct complaint, assume that there are no complications; (2) even if a post abortion examination is insisted upon, conditions which may develop into long range complications such as sterility or an incompetent uterus are not easily detectable without prolonged surveillance; (3) many women hide their identities when seeking abortion and may fail to return for a post abortion examination even when one is available; (4) over 60% of the women who need emergency treatment following an outpatient abortion go to a nearby hospital instead of going back to the abortionist; and (5) when women are treated for long term complications such as infertility, they may hide their past abortion experience or simply not realize that it is relevant. *Id.* at 91.

A 1974 random survey of 486 obstetricians (6% of the total 21,700 in the U.S. in 1979) about their experience with complications resulting from legal abortion revealed that: 91% treated patients for complications; 87% had to hospitalize one or more patients; and 6% reported one or more patients having died from a legal abortion. A. Saltzenberger, EVERY WOMAN HAS THE RIGHT TO KNOW THE DANGER OF LEGAL ABORTION 51 (1982) (hereinafter "EVERY WOMAN"). The Center for Disease Control admits that the reported rate of deaths due to legal abortion may be deliberately kept low through selective under reporting. *Id.*

Dr. Lester Hibbard, Chairman of Los Angeles County Medical Society, which is charged with keeping track of maternal deaths, reported that while only four abortion related deaths were officially reported in one year, he personally knew of at least four other unreported abortion-related deaths. HANDBOOK ON ABORTION at 80. Furthermore, he said that he was certain that the under-reported abortion deaths were only the "tip of the iceberg." *Id.* The Chicago Sun Times uncovered twelve unreported abortion deaths in only four abortion clinics. Zekman and Warrick, *The Abortion Profiteers*, Chicago Sun Times, Nov. 12, 1978, at 1, Col. 1.

Other countries' mortality rates from abortion strongly suggests that the United States seriously under reports abortion-related deaths. For example, Sweden's death rate for legal abortions is 39 per 100,000, Denmark's reported deaths are 30 per 100,000, Canada lists 36 per 100,000, and in one study in Britain, a fatality rate of 75 per 100,000 was found. By suspicious contrast, the United States reports less than 2 deaths per 100,000 legal abortions. Reardon at 112.[3]

3. Emotional And Psychological Harms From Abortion.

In addition to the mortality and physical risks of abortion, the risks to the emotional and psychological well being of adolescent mothers are profound. *See* Focus on the Family *Amicus Brief* in *Turnock* v. *Ragsdale*, (No. 88-790), Appendix, Table 2. "Compared with adults, adolescents appear to have somewhat more negative responses on the average following abortion." Adler & Dolcini, *Adolescent Abortion: Psychological Issues In Abortion For Adolescents*, in ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES 84 (G. Melton Ed., 1986) (hereinafter "Adler & Dolcini"); Freeman, *Abortion: Subjective Attitudes and Feelings*, 10 FAMILY PLANNING PERSPECTIVES 150 (1978).

Relying on medical and psychological studies, the Court in *Matheson* observed that:

> The emotional and psychological effects of the pregnancy and abortion experience are markedly more severe in girls under eighteen than in adults. Wallerstein, Kurtz and Bardin, *Psychological Sequelae of Therapeutic Abortion in Young, Unmarried Women*, 27 ARCH. GEN. PSYCH. 828 (1972) (hereinafter "Wallerstein"); *see also* Babikian and Goldman, *A Study of Teenage Pregnancy*, 128 AM. J. PSYCH. 755 (1971) (hereinafter "*Study of Teenage Pregnancy*").

[3] The present claims for low abortion mortality rates in the United States should also be compared to experience prior to *Roe* v. *Wade* when states with permissive abortion laws were allowed to require reporting of legal abortion related deaths. Oregon reported 13.9 abortion deaths per 100,000 legal abortions compared to only 8.4 maternal deaths per 100,000 live births, while Maryland reported 40.5 deaths per 100,000 legal abortions compared to 23.1 maternal deaths per 100,000 live births. According to these pre-*Roe* statistics, the mortality rate for legal abortion was nearly twice as high as the overall maternal mortality rate, a statistic which has been confirmed in many foreign countries. Reardon at 111-112.

Matheson, 450 U.S. 411 n.20.

One study found that relatively more minors than older women suffered severe anxiety, acute depression, and long-term guilt following abortion. Cates, *Adolescent Abortion in the United States*, 1 J. ADOLESCENT HEALTH CARE 18 (1980), whle another study reported that nearly one third of the young women who had abortions showed moderate to severe decline in psycho-social functioning five to seven months after the abortion. Wallerstein at 830.[4] The research in that study concluded:

> [I]n the fourteen to seventeen year age span consequent symptom manifestations, even when only transient, tended to be more dramatic and more severe in this younger group . . . [o]verall it is clear that the pregnancy and abortion experience in the younger and less mature, is at considerable heightened risk, a point of potential major maturational skewing.

Wallerstein, at 832; *see also* Perez-Reyes & Falk, *Follow UP After Therapeutic Abortion in Early Adolescence*, 28 ARCH. GEN. PSYCH. 120, 124 (1973) (hereinafter "Perez-Reyes").

One of the particular difficulties for adolescents is the problem of dealing with the very real sense of loss after an abortion is performed. Horowitz, *Adolescent Mourning Reactions to Infant and Fetal Loss*, 59 SOCIAL CASE 551 (1978) (hereinafter "Horowitz"). In an extensive community based study in Denmark of 17,378 women carrying to term and 27,234 women aborting, the psychiatric hospitalization rate for teenage abor-

[4] These young women, at initial follow up, were suffering with a variety of specific symptoms of maladaptive behavior, including mild to moderate depressive episodes, a variety of new physical complaints for which medical attention had not been sought . . . difficulty in concentrating in school, withdrawal from previous social contacts, lowered self-esteem explicitly related to the pregnancy and abortion experience, a newly begun promiscuous pattern in relationships with men, and regression to more infantile modes of relationships with parents. These difficulties did not pre-date the pregnancy. Wallenstein, at 830, cited in *Matheson*, 450 U.S. at 412 n.20.

ters was 11.4 per 10,000 while only 6.2 per 10,000 for teenagers who carried the baby to term. David, Rausmussen and Holst, *Postpartum and Post Abortion Psychotic Reations*, 13 FAMILY PLANNING PERSPECTIVES 88-92 (1981). Heightened risk of teen suicide following abortion and severe cases of anniversary reaction have also been observed. Tishler, *Adolescent Suicide Attempts Following Elective Abortion: A Special Case of Anniversary Reaction*, 68 PEDIATRICS 670 (1981).

Teenage abortion may also involve a severe double loss for the adolescent, who may compensate for her first abortion by becoming pregnant, and then may decide to have another abortion. *Portrait* at 92; *see also* Teitze, *Repeat Abortions, Why More?*, 10 FAMILY PLANNING PERSPECTIVES 205, 286 (1978).[5] Many researchers and clinicians strongly believe that parental participation will solve this cycle of problems. *See* Torres, Forrest and Eisman, *Telling Parents: Clinic Policies and Adolescents Use of Family Planning and Abortion Service*, 12 FAMILY PLANNING PERSPECTIVE, 284-289 (1980) (hereinafter "*Telling Parents*"); Butler & Fujita, *Abortion Screening and Counseling: A Brief Guide for Physicians*, 50 POST GRAD MED 208, 212 (1971); Horowitz at 551.

A pregnant teenager is frequently overwhelmed by her feelings surrounding the problem pregnancy and subsequent abortion. Appellate Record at 868, *Hodgson* v. *Minnesota*, 850 F.2d 1452 (8th Cir. 1988) (Nos. 86-5423 and 86-5434) (testimony of Dr. Vincent Rue). To the extent she does not share these feelings with her parents, she becomes more isolated and alienated which in turn triggers a host of other psychological sequelae like guilt, depression and anxiety, which increase the risk of replacement pregnancies and multiple abortions. *Id.* at 868-869. However, when the "secret" pregnancy and con-

[5] One study shows that 17% of women under eighteen who had abortions were pregnant again within a year. Steinhuff, *Women Who Obtain Repeat Abortions: A Study Based On Record Lineage*, 11 Family Planning 30, 37 (1979). Another study showed that 41% of adolescents who had therapeutic abortions had resumed sexual intercourse six months later, more than two thirds of whom were then doing so without contraceptives. Perez-Reyes at 123.

templated abortion become known to her parents, her most stable and respected support, the teenager immediately reduces the psychological risks associated with keeping the "secret" and gains emotional strength and positive ideas from the family unit. Parental consultation can thus serve as an important catalyst to work through her psychological crisis. *Id.* at 867.

Adolescent aborters who avoid facing the difficulties of the abortion decision experience more psychological problems than the non-avoiders. Cohen, Laurie, Roth and Susan, *Coping With Abortion*, 10 JOURNAL OF HUMAN STRESS 140, 142 (1984). Besides the natural sounding board and emotional support which the family provides in times of crisis, parental consultation can provide significant help to promote maternal health of the pregnant teenager. J. Burtchael, RACHEL WEEPING AND OTHER ESSAYS ON ABORTION 42 (1982) (hereinafter "RACHEL WEEPING"). For example, parents can provide the abortion providers or subsequent physician treating the complications from abortion with medical and psychological history which would be critical to reducing or avoiding altogether physical and psychological risks from teenage abortions. *Matheson*, 450 U.S. at 411.

B. Parental Consultation Substantially Benefits The Minor's Decision Making Process.

There is substantial evidence that adolescents change markedly as they progress through adolescence, and differ significantly from adults, in at least five ways, in how they make decisions on whether to abort or carry the baby to full term:

(1) Adolescents consider fewer and different factors in pregnancy decisions and in potential childrearing decisions;

(2) Adolescents consider future solutions and goals less than adults;

(3) Adolescents delay their decision more than adults;

(4) Adolescents differ from adults in consideration of future consequences in hypothetical dilemmas; and

(5) Adolescents have been found to differ from adults in their ability to understand aspects of moral decisions from the viewpoint of others.

Worthington at 134-135 (citations omitted).

The foregoing differences in decision making between adolescents and adults suggest that parental involvement helps adolescents, especially younger ones, make better decisions about how to react to her pregnancy in at least five ways.

First, parental notification requires the adolescent, through the waiting period provision of parental notification laws, to take 24 to 48 hours to consider the decision to abort, rather than respond immediately to the often demand-laden situation of finding that she is pregnant while at a clinic that does abortions. One study suggests that pregnant adolescents are particularly vulnerable to immediate situational cues in making pregnancy resolution decisions. Cobliner, *Pregnancy and Single Adolescent Girls: The Role of Cognitive Functions*, 3 JOURNAL OF YOUTH AND ADOLESCENTS 17-29 (1974).

Second, notifying parents allows them to give her balance and support in the decision making. While the initial response to learning about the pregnancy may be stressful for the parents, and they may consider their own wishes and fears in addition to their daughter's, parents will generally have more experience in making decisions under emotional strain and will be more likely to carefully consider a variety of options than will the adolescents. Worthington, *The Benefits of Legislation Requiring Parental Involvement Prior to Adolescent Abortion* in VALUES AND PUBLIC POLICY 221, 226-227 (G. Regier Ed. 1988) (hereinafter *Parental Involvement*).

While the decision to abort is difficult, even for an adult woman, teenage girls are particularly subject to ambivalence and confusion regarding the abortion decision. Horowitz at 557. One study found that almost one third of young women (31.8%) changed their minds once or twice about continuing the pregnancy or having the abortion, and 18% changed their minds even more frequently. Klerman, Bracken, Jeckel and Bracken, *The Delivery-Abortion Decision Among Adolescents*

in PREGNANCY AND ADOLESCENCE 219, 227 (1982) (hereinafter "*The Delivery-Abortion Decision*"); *see also* Wallerstein at 829 (reported that nearly 60% of young women studied reported conflict regarding the abortion decision). Nearly 20% stated that a central emotional issue revolved primarily around their deception of their families and the burden of secrecy. *Id.*

Parents will supply other points of view and provide other alternatives, such as adoption, marriage to the putative father, and raising the child at home. Their impact can help broaden her understanding of the ramifications of her decision. *Parental Involvement* at 227. As this Court has recognized:

> Abortion may not be the best choice for the minor . . . Alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibility of motherhood with the assured support of family may be feasible and relevant to the minor's best interests.

Bellotti II, 443 U.S. at 642-43.

Third, parents are also able to correct any misapprehensions that their daughter might have and to challenge her erroneous beliefs. Mirachek, *Counseling Adolescents with Problem Pregnancies*, 42 AMERICAN PSYCHOLOGISTS 84-88 (1987). One frequent erroneous belief that would be corrected is that parents will reject the adolescent because of her pregnancy. In fact, parents usually react less negatively than adolescents anticipate. There is substantial evidence that most parents will support their daughters during an adolescent pregnancy. Barglow, Bornstein, Etsome, Wright and Visodsky, *Some Psychiatric Aspects of Illegitimate Pregnancy During Early Adolescence*, 37 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 266, 267 (1967).

After a preliminary period of disequilibrium (anger, disappointment, disgust), there appears to be a more stable problem solving and acceptance process when both the mother and daughter take steps toward resolving these problems in the pregnancy. *Parental Involvement* at 230. In numerous studies, over two-thirds of the families reported that members strongly

support each other, participate with the pregnant adolescent, and demonstrate attachment to the new child prior to birth. *Id.* In one study, young women felt that 67% of their mothers and 74% of their fathers would have negative reactions toward abortion. Among those minor women who did finally inform their parents of their decision to have an abortion, reported reaction to the news expressed by both parents were overwhelmingly positive. Few negative responses were reported. Clary, *Minor Women Obtaining Abortion: The Study of Parental Notification in Metropolitan Areas*, 72 AM. J. PUB. H. 283-284 (1982) (hereinafter "Clary").

Fourth, parents supply the real life experience in autonomy and problem solving which adolescents often lack—young women rely on less analytic approaches to the problem such as following the normative behavior of their peers in basing their decisions on romantic, unrealistic scripts. Ramsey, *Representation of a Child in Protection Proceedings: The Determination of Decision Making Capacity*, 17 FAMILY LAW QUARTERLY 315, 344-345 (1983) (hereinafter "Ramsey"):

> The ability to reason abstractly and foresee consequences which is so important making a good decision of such magnitude, [i.e., pregnancy resolution] is lacking in most teenagers.

Eisen, Zellman, Liebonitz, Chow and Evans, *Factors Discriminating Pregnancy Resolution Decisions of Unmarried Adolescents*, 108 GEN. PSYCH. MON. 69, 94 (1983). "Minors often lack the experienced perspective and judgment to avoid choices that could be detrimental to them." Clary at 284.

Fifth, parental involvement tends to moderate the emotional upheavals of adolescents which often impact heavily upon their ability to make sound judgments. "Teenagers may tend to be egocentric and to make irrational and emotional decisions about themselves and others. A particular fourteen year old may have been more capable of making a certain decision when she was younger, before the emotional upheavals of adolescence interfered with her judgments." Ramsey at 315.

This Court has recognized the significance of parents in the minor's decision making process:

> There can be little doubt that the state furthers a consitutionally permissible end by encouraging an unmarried, pregnant minor to seek the help and advice of her parents in making the very important decsion whether or not bear a child. That is a grave decision and a girl of tender years under emotional stress may be ill equipped to make it without advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at the abortion clinic.

Danforth, 428 U.S. at 91 (Stewart, J., concurring). *See Bellotti II*, 443 U.S. at 637. A consistent thread in these cases and others is a recognition of the profound significance to the minor's well being of parental participation in the abortion decision.

C. Parental Consultation Helps Protect Vulnerable, Immature Minors From Exploitation.

Pregnant teenage girls are "particularly vulnerable" to abortion clinics which offer immediate answers to an unwanted pregnancy, and to the influence of their peers and boyfriends. *See Bellotti II*, 443 U.S. at 634. "There is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion." *Matheson*, 450 U.S. at 407. In a 1980 survey of abortion clinics, it was found that less than half require parental notice even for teenagers fifteen years of age or younger; and even fewer require parental notification before performing abortions on minors aged sixteen and above. *Telling Parents* at 285 (Table 1). Almost half (45%) of the 1170 teenage abortion patients interviewed admitted that their parents had no knowledge of their intended abortion. *Id.* at 289 (Table 5). Over 90% of these teenagers were living with their parents, with only 4% living with relatives or friends. *Id.* at 287.

Numerous studies reveal, however, that adolescents have a particular need for adult guidance in areas like abortion in which they have no childhood experience to guide them, E. Hurlock, ADOLESCENT DEVELOPMENT 250 (4th ed. 1973), and which create severe emotional stress and psychological pressure "to avoid or escape the problem." *Bellotti II*, 443 U.S. at 635. Benson & Stack, *Help or Hindrance: Parental*

Impact on Pregnant Teenagers' Resolution Decisions, 31 FAMILY RELATIONS 271, 279 (1982); R. Mnookin, IN THE INTEREST OF CHILDREN 158, 237-239 (1985).

The majority of abortions now are performed by strangers in unfamiliar surroundings, where minors are alone, furtive and frightened visitors subjected to assembly line abortion techniques to give them their "quick fix." *See Danforth*, 428 U.S. at 91, 92 n.2 (Stevens, J., concurring); Blum, *Impact of Parental Notification Law*, 77 AM. J. PUBLIC HEALTH 619 (1987). Dr. Edward Allred, whose chain of abortion clinics performs 60,000 abortions per year, grossing twelve million dollars annually, has stated:

> Very commonly we hear patients say they feel like they're on an assembly line. We tell them they're right. It is an assembly line . . . We're trying to be as cost effective as possible and speed is important . . . [W]e try to use the physician for his technical skill and reduce the one-on-one relationships with the patient. We usually see the patient for the first time on the operating table and then not again . . ."

"Doctors Abortion Business is Lucrative," The San Diego Union, Oct. 12, 1988, at 3A, Col. 5.

The abortionist has a direct conflict of interest—profit—when counseling a vulnerable, frightened, pregnant teenager whether to have an abortion.

The typical abortion "counselor" also has such a personal, psycho-social stake in abortion that she often cannot give meaningful, objective counsel, even if she was instructed to. Abortion counselors have promotional jobs in which they exploit the natural, centrifugal pressures that make communication between adolescents and parents difficult, and are willing to weaken whatever remains of the parent-child link of honest interaction to promote abortion.[6] RACHEL WEEP-

[6] Family planning programs "are more efficient at convincing teens to avoid birth than to avoid pregnancy." Weed, *Curbing Births Not Pregnancies*, The Wall St. J., Oct. 14, 1986, at 36, Col. 4 (hereinafter Weed). Despite a massive, government-financed campaign that has increased the provision of family planning services to teenagers by 600% in twelve years (in 1980, 30% of all teens were involved in family a planning program), and despite predictions by family planners that the rate of pregnancy among teenagers would drop by 200—300 *pregnancies* for every 1000 teenagers involved in family-planning programs, Olsen & Weed, *Effects Of Family Planning Programs For Teenagers On Adolescent Birth and Pregnancy*, 20 FAMILY PLANNING PERSPECTIVES 153, 157-61 (1986) [hereinafter Olsen & Weed], recent research found "a net increase of about 100 pregnancies" for every 1000 teenagers using family planning services. *Id.* at 160, 151; Weed & Olsen, *Effects of Family-Planing Programs on Teenage Pregnancy—Replication And Extension Rates*, 20 FAMILY PLANNING PERSPECTIVES 173, 190 (1986) [hereinafter Weed & Olsen]. Instead of reductions of more than 150 *abortions* per 1000 teenagers using family planning services, predicted by family planners, Weed & Olsen found that the rate of abortion increased by more than 100 per 1000 teenage family planning clients. Weed at 36; Olsen & Weed, *supra* a 161-645, 67; Weed & Olsen, at 190. "Family planning is associated with higher, not lower, abortion rates." *Id.*

ING at 41-44. According to past counselors, "at the abortion clinic you aren't really expected to present alternatives to abortion." *Id.* at 43. "Counselors are just to give the appearance of help . . . They think of themselves as company for the women . . . The counseling was more of an assurance process." Weed, *Curbing Births Not Pregnancies*, The Wall St. J. Oct. 14, 1986, at 42, Col. 4. (citing L. Francke, THE AMBIVALENCE OF ABORTION 25, 30 (1978).

Many similar stories are reflected by the following teenager who obtained a "safe," legal abortion with no immediate, physical complications:

> When I was 17 I found myself in a crisis pregnancy . . . When I went to the local family planning clinic, I sought guidance and wanted to know what I could do about my situation. I wanted a helping hand. When I walked into the clinic, I trusted the nurses and doctors, and thought they were concerned about my health enough to help me make a decision, not make my decision for me.
>
> Only one solution was strongly recommended that day. When I questioned the development of my baby, I was told it wasn't a baby yet, and that it looked like a tadpole. Since that day I have learned differently . . . *I was told that abortion was simple and safe and that I could go and live the rest of my life and have children* when I was in a position to provide for them. I heard no scientific facts that day, only biased opinions. I was not told what abortion itself could do to me in the years to come, only that it was

> "safe and simple." I was not told that I would *abuse myself with alcohol, try to kill myself, develop an eating disorder, and have terrible dreams.* Worst of all, I was not told that I might never have another child. It has been 14 years since my "safe and simple" abortion and *I will never be able to have another child.*

Letter from Sue Liljenberg to Sen. Gordon Humphrey June 6, 1986 (emphasis supplied). *Amici* Focus on the Family, Family Research Council and American Victims of Abortion have received or heard of thousands of similar or worse stories of exploitation; and thus, Justice Stewart's conclusion in his concurring opinion in *Danforth* may be an understatement: "[I]t seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place." *Danforth*, 428 U.S. at 91.[7]

Without the required parental notification/consent laws, pregnant adolescents who are ashamed, fearful and confused will not generally consult their parents even in the best of families as illustrated by the real life experiences of *amici* (*see* Appendix A). In one recent study of pregnant teenagers considering abortion, 71% informed a best friend, while only 37% informed mothers and 26% informed fathers. The Delivery-Abortion Decision Among Adolescents, at 219; *see also Telling Parents* at 289, Table 5. As Justice Stevens recognizes:

> If there is no parental [notice] requirement many minors will submit to the abortion procedure without even informing their parents. An assumption that the parental reaction will be hostile, disparaging or violent no doubt persuades many children to bypass parental counsel which

[7] Justice Stewart in his concurring opinion in *Danforth* further described the "counselling" exprience at abortion clinics as follows:

> "The counselling . . . occurs entirely on the day the abortion is to be performed . . . it last for two hours and takes place in groups that include both minors and adults who are strangers to one another . . . The physican takes no part in this counselling process. . . . Counselling is typically limited [only] to a description of abortion procedures, possible complications, and birth control techniques . . .

Danforth, 428 U.S. at 91-92 n.2, quoting Brief for Appellants in *Bellotti I*, O.T. 1975, No. 75-78, pp. 43-44.

> would in fact be loving, supportive and indeed, for some, indispensable. It is unrealistic, in my judgment to assume that every parent child relationship is either (a) so perfect that communication and accord will take place routinely; or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will . . . [act] arbitrarily to further a selfish interest rather than the child's interest.

Danforth, 428 U.S. at 103-104 (Stevens, J., concurring in part and dissenting in part); *see also Matheson*, 450 U.S. at 419-20 (Powell, J., concurring) and *Matheson*, 450 U.S. at 424 (Stevens, J., concurring).

Research strongly emphasizes that adolescents' decisions regarding abortion or childbirth are significantly affected by counsel they receive from others—if not abortion clinic staff, then teenage peers or boyfriend. *See* E. Hurlock, ADOLESCENT DEVELOPMENT 75-77 (4th Ed. 1973); J. Gallagher, *MEDICAL CARE FOR THE ADOLESCENT* 243 (3rd Ed. 1976); I. Josselyn, *ADOLESCENCE* 42-43 (1971); Brittain, *Adolescent Choices and Parent-Peer Cross Pressures*, 28 AM. SOC. REV. 385 (1963). Peers are not only the most frequent source of sex information to adolescents, but they frequently are the source of misinformation about abortion. Hanson, *Abortion in Teenagers*, 21 CLIN. OBST. AND GYN. 1175, 1180 (1978). The teenager vulnerability is underscored by the studies which reveal that in over 78% of teenager abortion cases, girls reported that they had been strongly influenced by someone who encouraged abortion. Adler & Dolcini at 74.

The bottom line is that vulnerable adolescents are exploited either consciously by abortion providers or unknowingly by the teenage peers who are equally uninformed, misinformed or emotionally and experientially unable to render rational, objective advice on abortion or childbirth. Thus, parental consultation provides the people who are most interested in the ultimate well being of pregnant adolescents the opportunity to protect them against false, misleading, prejudicial or harmful advice from their abortion "counselor" and their equally uninformed peers.

D. Parental Consultation Promotes Legitimate Parental Authority And Family Unity.

1. Parental Control.

The parent-child relationship is generally outside the reach of government regulation. Accordingly, the state can only interfere with parental control of their children in exceptional cases where it is necessary to protect the health or safety of the child. *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (Prince); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). The Court has long recognized the importance of parental control, especially in the teenage abortion context. For example, the plurality in *Bellotti II* recognized:

> [W]e cannot ignore that central to many of these theories, and deeply rooted in our nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, 'constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. *Ginsberg* v. *New York*, 390 U.S. 629 (1968).

Bellotti II, 443 U.S. at 638-639. *Prince* v. *Massachusetts* also recognizes the primacy of parental control over their children:

> "It is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The legislature could properly conclude that parents and others . . . who have the primary responsibility for children's well being are entitled to the support of law designed to aid discharge of that responsibility."
>
> *Prince*, 321 U.S. at 166.

An additional and more important justification for state deference to parental control over children is that:

> [T]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with a high duty, to recognize and prepare him for additional obligations. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925). "The duty . . . must be read to include the inculcation of moral standards, religious beliefs and elements of good citizenship." *Wisconsin* v. *Yoder*, 406 U.S. 205, 233 (1972).

Bellotti II 443 U.S. at 637-638.

Some legal scholars and justices have suggested that there may be a *constitutional right to parental notification and consent*.[8] Whether or not there is such a constitutional right, a state clearly has a legitimate, if not compelling, interest to encourage and promote parental authority. Notification and consent laws foster these parental rights while recognizing the historical, legal limitations of its young citizens:

> Because he may not foresee the consequence of his decisions, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases or even attend exhibitions of constitutionallay protected adult motion pictures. Persons below a certain age may not marry without parental consent and they may not vote. . . . But even if it is the most important kind of decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative.

Danforth, 428 U.S. at 102-103.

Because "the most significant consequences of the abortion decision are not medical in character," *Danforth*, 428 U.S. at 103, the State unquestionably has an interest in ensuring that a teenager receive the best advice and consultation which clearly includes that from her parents. *Bellotti II*, 450 U.S. at 423.

2. Family Involvement.

Unless a family is involved, adolescent pregnancy can contribute to family estrangement and increased parent-child

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[8] The Court's opinions discussed in the text above—*Pierce*, *Yoder*, *Prince*, and *Ginsberg*—all have contributed to a line of decisions suggesting the existence of a *constitutional parental right against undue, adverse interference by the State*. *Bellotti II* 443 U.S. at 639 n.18. *See also Amicus Brief of* Concerned Woman of America in *Ohio* v. *Akron Center For Reproductive Health*, No. 88-805.

schism. *Parental Involvement* at 232. For example, researchers generally list six reasons for family involvement with adolescent pregnancies and the "abortion versus childbirth" decision:

> 1. The family's need to deal with its pervasive sense of failure precipitated by the pregnancy . . .
>
> 2. Family members' needs to clarify their different views about the pregnancy and the unborn baby . . .
>
> 3. The need for the adolescent and her parents to resolve any conflict existing prior to the pregnancy, especially those resulting from the pregnancy situation . . .
>
> 4. The importance of maintaining and/or improving communication in a crisis situation for the adolescent and her family . . .
>
> 5. Parents' need to maintain their relationship while they parent their daughter through the crisis of pregnancy
>
> 6. Parents' and adolescent's need to resolve developmental independency-dependency issues.

Parental Involvement at 234 (citations omitted).

Failure to involve her family will exacerbate and hide the root causes for the pregnancy, intensify family disunity and increase the minors' psycho-social problems of isolation, guilt, fear and depression. *Id.* Without parental involvement legislation, those girls who opt for abortions out of a mistaken perception of their parents' reactions deprive themselves of their parents' support during their crisis—the most powerful and permanent social and family support they have—and will either: (a) erect a wall of guilt and secrecy between themselves and their parents; or (b) later reveal to their parents that they not only got pregnant but did not trust or honor their parents and made an unilateral abortion decision. Worthington at 231.

One scholar concluded that adolescent pregnancy can often result in "building family morale, intensifying family exchanges and [if childbirth is chosen] filling the empty nest." Furstenberg, *Burdens and Benefits: The Impact of Early*

Childbearing on the Family, 1980 J. SOCIAL ISSUES 36, (1980). Even if parents and daughter do not end up with the same views towards abortion versus childbirth after consultation, most parents will provide emotional and psychological support during and after their daughter's decision pertaining to the crisis pregnancy. *Parental Involvement* at 230.

In an era when the family has been rendered increasingly vulnerable to dissolution, we should not gratuitously add to the stress by enshrining in law the starkly individualistic view that a child in the making, which can be a future shared relationship of the family, is wholly and completely a 'private' matter for the teenage girl to determine. Etozioni, *The Husband's Rights in Abortion*, 12 TRIAL 56, 58 (1976).

Family involvement in decisions about abortion or bearing a child to term thus promotes increased family unity in at least four ways. First, it will permit the family to deal with some of the underlying issues to adolescent pregnancy, i.e., power struggle, rebellion, substance abuse, depression, and immaturity. Second, in families where the girl might have opted for a secret abortion, the compounding of problems (broken relationship with parents, lack of communication, distrust, alienation and isolation) can be avoided. Third, shared experiences where a mutual, well thought out decision is made by both the daughter and parents promote emotional and psychological support for whatever decision is made, whether abortion, adoption or childbirth. Finally, the parents' knowledge of an impending abortion allows the parents to communicate important medical information about the adolescent to the abortion doctor during the required waiting period, or in the case of later complications from the abortion, to the subsequent treating physician.

II. STATE NOTIFICATION AND CONSENT LAWS ARE RATIONALLY RELATED TO LEGITIMATE INTERESTS AND DO NOT "UNDLY BURDEN" A MINOR'S RIGHT TO HAVE AN ABORTION.

The federal courts' deference to state legislatures on the parental consultation question is a function of the standard of

review adopted: strict scrutiny, rational basis or some intermediate standard. "A woman's ability to choose an abortion is a species of 'liberty.'" *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 790 (1986) (White, J., dissenting) ("*Thornburgh*") *see also Roe* v. *Wade*, 410 U.S. at 113 (Rehnquest, J., disssenting). The presence of such a liberty interest, however, ordinarily means only that state regulation affecting that liberty interest must be procedurally fair and must bear a *rational relation* to valid state objectives. *See Williamson* v. *Lee Optial Co.*, 348 U.S. 483, 486 (1955).

State regulation will only be subjected to the higher standard of strict scrutiny, if it *substantially interferes* with a fundamental constitutional right. *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 462 (O'Connor, J., dissenting) ("*Akron I*").

Numerous other cases have adjudicated state abortion laws on the *rational basis* standard. In *Carey* v. *Population Services International*, 431 U.S. 678, 693, 696 (1977) for example, the statute was measured by whether it provided "a *rational means* for accomplishment of some *significant state policy*." In *Maher* v. *Roe*, 432 U.S. 474 (1977), *Poekler* v. *Doe*, 432 U.S. 519, 421 (1977); and *Harris* v. *McRae*, 448 U.S. 297, 325 (1980), the Court again required only a showing that Congress' authorization of "reimbursement for generally, medically necessary services generally but not for certain medically necessary abortions was *rationally* related to the legitimate government goal of encouraging childbirth." *Webster* v. *Reproductive Health Services*, 57 U.S.L.W. 5023, 5028 (U.S. June 27, 1989) (emphasis added).

Three members of the *Webster* plurality referred to the "rational basis test" and "promotion of States' interest standard" throughout the opinion, and concluded:

> It is true that the tests in question increase the expense of abortion and regulate the discretion of the physician . . . But we are satisfied that the requirement of these tests *permissibly furthers* State's interest in protecting human life and we therefore believe the statutes to be constitutional . . . The Missouri testing requirement here is *reasonably designed* to ensure . . . an end which all concede is *legitimate* . . .

Webster, 57 U.S.L.W. at 5031 (emphasis added).

While strict scrutiny and rational basis tests have generally been judicial reference points in review of state laws, the intermediate standard of "undue burden" has also arisen in the abortion context. *Akron I*, 462 U.S. at 461 and 461 n.8 (O'Connor, J., dissenting). Justice O'Connor's two-tier approach to reviewing state abortion laws acknowledges that even if the state provisions do burden the right to seek an abortion, the Court must then consider "whether this burden *reasonably relates* to legitimate state interests." *Id.* at 471 n.15 (O'Connor, J., dissenting); *see Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting). If the regulation "unduly burdens" the protected interest, Justice O'Connor would require states to demonstrate a compelling interest in the legislation. This "second tier" undue burden has only been found in situations involving "absolute obstacles or severe limitations" on the abortion decision such, as in *Danforth*, 428 U.S. at 79, where prohibition of saline amniocentesis was completely prohibited for abortions after twelve weeks; and *Bellotti II*, 443 U.S. at 622 where parental consent without a judicial bypass procedure was considered an arbitrary, total parental veto over the minor's abortion decision. *See Akron I*, 462 U.S. at 464 (O'Connor, J. dissenting). According to this test, if an *undue burden* is found in the threshold inquiry, the Court should then decide whether a *compelling state interest* justifies the undue burden. *Id.* at 463.

The appropriate standard to review state notification and consent laws should be whether the laws are *reasonably related* to promote or further *legitimate state interests*. The countervailing protected right to abortion is "qualified," *Roe*, 410 U.S. at 154, and thus, where the state interests directly impact its ability to protects its citizens, this Court should defer to state legislative authority. In the parental consultation context, the Court has recognized many legitimate and compelling state interests: (1) to protect the mental and physical

well being of pregnant minors; (2) to promote informed, rational decision making and family unit; and (3) to protect potential human life—all of which notification and consent laws promote and permissibly further.

Even if the undue burden test is applied, notification laws with a judicial bypass procedure as in the present case should still be upheld. Unlike *Akron I*, *Danforth* or *Bellotti II*, the parental notifications here do not place "a complete prohibition on abortion in certain circumstances," *Akron I*, 462 U.s. at 429 n.11. Nor does it place an absolute and possibly arbitrary parental veto over the abortion decision. *Danforth* 428 U.S. at 74 and *Bellotti II*, 43 U.S. at 642-644. Since the laws do not unduly burden the minors' right to have an abortion, the compelling interests of the state do not have to be examined.

III. FEDERAL COURTS MUST GIVE GREAT JUDICIAL DEFERENCE TO STATE ABORTION LEGISLATION, PARTICULARLY IN MATTERS INVOLVING PARENT-CHILD RELATIONS.

In the last three abortion cases, the Court appears to recognize the dangers of judicial law making:

> The rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as our does. The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been *a web of legal rules that have become increasingly intricate, resembling a code of regulation rather than a body of constitutional doctrine* . . .

Webster, 57 U.S.L.W. at 5023 (Rehnquist, C.J. joined by White, J. and Kennedy, J.); *See Akron I*, 462 U.S. at 468-472 (O'Connor, J., dissenting); *Thornburgh*, 476 U.S. at 782-833 (Burger, C.J., White, J., and O'Connor, J., dissenting).

This Court has sailed from *Roe* into uncharted waters for sixteen years by constantly superseding legislative judgment

and "making Constitutional law in this area a virtual Procrustean bed." *Webster*, 57 U.S.L.W. at 5030.

The Court must keep in mind that:

> the appropriate forum for . . . resolution [of extremely sensitive issues like abortion] in a democracy is the legislature. We should not forget that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

Akron I, 462 U.S. at 465 (O'Connor, J., dissenting). (citations omitted). *See Maher*, 432 U.S. at 479-480.

Dissenters in *Thornburgh*, *Akron I* and at least three justices in *Webster* appear poised to return this Court to adjudicating state abortion laws and regulations based on the correct judicial review standard of "rational basis" and to giving state legislatures greater leeway to effectuate legitimate state interests. *Thornburgh*, 476 U.S. at 796-797 (White, J., dissenting); *see Oregon* v. *Michell*, 400 U.S. 112, 206-207 (1970) (Harlan, J., concurring); *id.* at 247-48 (Brennan, J., concurring). If accomplished, state laws routinely struck down by this Court, "would be sustained." *Webster*, 57 U.S.L.W. at 5030; *Thornburgh* at 802 (White, J., dissenting); *id.* at 783 (Burger, C.J., dissenting).

Withour reference to the constitutional right to parental notification implied in *Pierce*, *Yoder*, *Prince* and *Hinsberg*, and suggested in *Bellotti II*, 443 U.S. at 639 n.18, it is clear that judicial authorities should give greater deference to state legislatures to effectuate important state interests such as *parental prerogatives* to raise their children, to participate in their medical, moral and religious decisions and to unify their families. These are not issues in which federal courts have any particular expertise or historical authority:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children . . . [H]istorically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham v. *J.R.*, 442 U.S. 584, 602 (1979). *See further*, *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1974); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

In parental notification and consent cases, the Court has recognized these principles. In *Matheson*, the Court upheld parental notification because "the Constitution does not compel a state to fine tune its statutes so as to encourage or facilitate abortions. 450 U.S. at 413; *see also Akron I*, 462 U.S. at 469 (O'Connor, J., dissenting).

Bellotti I and II, *Danforth*, *Matheson* and *Ashcroft* demonstrate the legitimacy of parental consultation and waiting periods to protect immature, unemancipated teenagers having abortions. Non-abortion surgical procedures involving minors require no less. *Thornburgh*, 476 U.S. at 785 (Burger, J., dissenting) (no surgeon would perform an amputation or even an appendectomy on a fourteen old girl without the consent of a parent).

The Court in this case should exercise traditional judicial deference in the parental rights and abortion context and steer this misguided ship back into port by following channel lights which flash broad, constitutional principles for parental notification. Enunciating more intricate and complex rules for parental consultation will only continue this ill-fated voyage. The Court should return to *traditional* constitutional principles where *judicial deference* to state legislatures is practiced and state abortion laws are appropriately reviewed by their *rational relationship to legitimate state interests*.

CONCLUSION

The Court should apply the rational basis test to the state parental notification and consent law in this case and the state law should be upheld.

Respectfully submitted,

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APPENDIX

APPENDIX A

DESCRIPTION OF *AMICI*

Amicus **Focus on the Family** is a Christian, nonprofit organization that is committed to strengthening the emotional, psychological and spiritual health of families in the United States and throughout the world. Its daily radio broadcasts dealing with family concerns and interests are heard by more than one million people daily over 1300 stations. Its monthly magazine has a circulation of 1.7 million. It receives an average of more than 8000 letters daily, many of which describe the causes and results of past trauma, including the abortion experience.

Amicus **Family Research Council,** a division of Focus on the Family, is a voice for the pro-family movement in Washington, D.C., and provides policy analysis and research support for pro-family and religious groups across America. As such, it studies matters affecting the family, including the effects of abortion.

The central issue in this case—parental notification and consent for minors undergoing abortions—represents a unique intersection of the concerns of Focus on the Family and the Family Research Council. The issue of parental consultation goes to the heart of the parent-child relationship, and the proper involvement of the state in protecting that relationship from undue interference or preemption. Both Focus on the Family and the Family Research Council have significant and substantial knowledge and experience in this area that can assist this Court.

Amicus **Rachel Ely** was a seventeen year old unmarried high school student when she learned that she was pregnant. Her high school counselor recommended that she have an abortion, arranged for State funding for the abortion, and recommended a particular abortion clinic. No other alternatives were discussed. Rachel was afraid to tell her parents that she had become pregnant. Because Rachel was not aware

of any alternatives, she consented to the abortion. Had Rachel's parents known their daughter was pregnant, they would have provided her with the alternatives of keeping her child or placing the child for adoption.

After her abortion, Rachel received no discharge instructions from her physician. Several days later she developed some flu-like symptoms in her chest, which she did not associate with her abortion because she believed that any symptoms she might have as a result of a complication from an abortion would be in her pelvic area. She went to her family doctor when these symptoms became worse. She did not tell the doctor about the abortion because she did not think the symptoms were related.

Sometime later, Rachel became very sick, and her father took her to a local hospital because of her persistent flu-like symptoms. The next morning Rachel was found in her hospital bed in a comatose condition. Subsequently, it was discovered that she had developed bacterial endocarditis—a condition directly attributable to a post-abortion surgical infection. The bacterial endocarditis had caused blood clots to develop and become lodged in the vascular system of her brain, causing a stroke. When Rachel recovered from her coma, she was left a permanently wheelchair-bound hemiplegic.

Had Rachel's parents been notified of the abortion, they would have questioned the possible relationship between the abortion and Rachel's symptoms. With simple antibiotic therapy, her devastating life-long disabilities would not have occurred.

Amicus **Myoshi Callahan** was fifteen when she had an abortion without her parents' consent. To use Myoshi's words, deciding to have an abortion was like a skydiver's "free fall." Her boyfriend and she decided—in view of the fact that they'd planned on getting maried anyway—that the "solution" to the situation was to get marrried "now instead of later." However, when his parents learned of her condition their reaction was

one of total, incensed rejection. They insisted that the only way the situation could be resolved was for her to have an abortion.

Earlier, when Myoshi had informed her mother that she was pregnant, she was aware that her mother was terribly disappointed in her. She wasn't angry, she didn't reject her, but Myoshi knew that the overriding reaction was disappointment. To her young mind, having the baby would only add to her mother's disappointment, and in view of her boyfriend's parents' reaction to her pregnancy, she "free fell" into deciding on an abortion without notifying her parents.

At the clinic, she received no counselling whatsoever. As she says, what does one know at fifteen? Her "choice," according to them, was abortion. Unfamiliar with the strategy of the clinic, afraid, and to her mind, alone, she had the abortion.

As a result of the procedure, Myoshi's periods became (and continued to be) abnormally severe, and she eventually had to have a hysterectomy. Emotionally and physically, she has suffered and continues to suffer. She has since told both parents, who grieved with her—grieved not only at the lost life, but because Myoshi went through the ordeal alone, an ordeal that would have been prevented had their consent been mandatory.

Myoshi is convinced that lack of parental notification and consent abrogates a parent's rights. "After all," she says, "how better to demonstrate responsibility and love than by giving them the benefit of their (mature) advice, and in my case, withholding their consent." She has no doubt whatsoever that had their consultation for an abortion been mandatory, she would never have had an abortion.

Amici **Teresa Wibblesman Fangman, Holly Trimble,** and **Linda Roselli** are women who procured abortions as minors without their parents' knowledge. To a large extent, their abortion decisions were uninformed. In retrospect, they believe that prior notice of their abortions to their parents would have significantly altered their experiences dealing with

their problem pregnancies. The *amici* are aware of the parental notice requirement at issue in this case, and they offer their experiences to the Court to illustrate the need many young girls have for that protection in making abortion decision.

Teresa Wibblesman was sixteen years old when she learned she was pregnant. She had been raised in a Catholic home and attended parochial schools. All she knew about abortion was that it would "take care of" the problem. No one at the family planning center, where her pregnancy was diagnosed, offered her any counseling except a referral to an abortion clinic. She made her decision to abort primarily because she was afraid to tell her parents of her pregnancy; she did not want them to know she had disappointed them. Her boyfriend took her from her Ohio home to a Louisville, Kentucky abortion clinic. At the clinic she signed consent forms which were placed in front of her without explanation. She does not remember reading the forms. The only counseling she received at the clinic was a brief description of the abortion procedure using a plastic anatomy model, given to a group of seventeen girls at once.

Teresa's abortion proceeded smoothly and she suffered no known physical complications. The abortion exacted an emotional toll, however. Teresa blocked the abortion from her mind but her self-worth had plummeted. She slipped into promiscuity and drug and alcohol abuse. She began to play what she calls "car games"—closing her eyes while driving over bridges, or accelerating on the freeway and closing her eyes until fear forced her to open them again.

Five years after Teresa's abortion, her fifteen-year old sister was impregnated on a "date rape." Teresa's sister, rather than obtaining a secret abortion, went to her parents with her problem. Together, they decided that the child would be carried to term and placed for adoption. Seeing her sister's trust in her parents and their warm support for her in her crisis produced feelings of jealousy in Teresa, causing her to wish she had handled her pregnancy the same way.

Nearly six years after her abortion, Teresa consciously acknowledged that she felt tremendous guilt over the abortion. Although she was still unmarried, she determined a time when she would be fertile and deliberately became pregnant on a "one-night stand." She made adoption arrangements in Louisville. Her little girl was born on the anniversary of her abortion. Teresa took her to Louisville for adoption to "replace" the child she had aborted there.

Teresa is convinced that if she had known at the time of her abortion decision what she now knows about her parents' supportive reaction to a problem pregnancy, she would not have chosen to abort. Thus, a parental notice requirement would, in Teresa's case, have saved her from the anguish which followed a decision that turned out to have been wrong for her.

Holly Trimble was also sixteen years old when she became pregnant. She was personally opposed to abortion, but she was afraid her parents would be hurt if they knew of her pregnancy. Her boyfriend's older brother and his girlfriend persuaded her that obtaining a secret abortion was the best thing for her to do. Holly recalls that she was not in good condition to make a decision; the pregnancy made her feel ill, and she was vomiting every day. Although she was ten weeks pregnant, she believed at the time that her fetus was just a "little egg." Prior to her abortion, she asked a matronly counselor at a state family planning office if women felt badly after abortions. "No, they're usually relieved because they can go on with their lives," she was told. "Sometimes a woman is bothered if she feels the fetus move before her abortion and she thinks it's alive; but she shouldn't because it's really not." She asked the physician about possible physical complications and was told by him that an abortion was much safer than carrying the child to term.

Within a week of her abortion, Holly did begin to feel badly about it. Because the main purpose of her abortion was to hide her pregnancy from her parents, she could not talk to them about her turmoil. When *Life* magazine ran pictures of ten--

week-old fetuses, Holly saw them and became horrified at what she had done. She felt intense guilt whenever she saw a baby. Eventually she sought help from a priest and her conscience was temporarily assauged. However, she abused drugs for several years and developed an eating disorder which lasted a decade.

Nine years later, Holly had married and become pregnant. She had learned more about fetal development and was acutely aware of the new life she was carrying within her body. That awareness stirred up memories and remorse over her earlier. Her depression became so severe that she sought professional help. Her psychiatrist finally hospitalized her in the psychiatric ward of a local hospital three months after the birth of her son. Eventually she was referred to another psychiatrist who placed her on anti-depressant medication for several months. Only after careful counseling did she improve to the point where she was able to go through another pregnancy and post-partum period without debilitating depression.

Holly still looks back at her abortion decision with great regret. She believes that if she had not felt it necessary to shield her parents from knowledge of her pregnancy, she would not have obtained her bortion. She also is certain that, if she had been exposed to information about fetal development at the time of her decision, she would have chosen to carry her child to term.

Linda Roselli was fifteen when she had an abortion without the consent of her parents. She went to a Planned Parenthood clinic to have a pregnancy test. With hindsight, she says now that she was a very "unenlightened" fifteen-year-old and, based on what she had watched on television, "suspected" that she might be pregnant. The people at Planned Parenthood told her she was losing her baby and arranged her next appointment. Linda returned thinking that they were going to help her through what she thought was to be a premature birth. She felt sure her mother would help her look after the baby, once it was born.

On the morning of the abortion they dilated her, put in a "seaweed," and told her to come back in the afternoon. When she returned to the clinic in the afternoon, Linda told them that "something was wrong." She was still under the impression that what was happening was all part of having a premature baby. She refused to take the drug (she believes it was Valium) they gave her. They ignored her tears and pleas for her mother. She was then strapped to the table, a needle was inserted into her stomach, and they hooked her up to a machine that, she recalls, made a noise like a vacuum cleaner. While this was happening, the nurse held her head down, telling her "not to look." When the noise stopped, she did look. She saw the large jar, and realized that they had performed an abortion, and that her baby was dead.

Yet the fact that her baby had been aborted did not "register" in her mind, and she kept crying and screaming and asking what they had done to her baby. When she insisted that all she had wanted was a pregnancy test and (on being told that she was losing her baby) help in delivering a "premature" baby, they produced the papers she had signed—unfortunately without questioning the people at the clinic, or reading the papers for herself.

Linda's mother did not know of her abortion at the time. Linda has since learned that if she had sought her mother's permission, it would not have been given and the abortion would not have been done. She knows now that her mother would instead have helped her raise her baby.

Emotionally, Linda has suffered greatly. It took her several years to learn to live with the guilt she felt. She says she "felt unclean." It seemed to her as though she would always be sad, and that the whole world knew, and considered her to be "a pig." For many years, she would not go out with boys; she says she was afraid of men. For many years—in fact, until approximately five or six months ago—Linda would go to a Planned Parenthood clinic rather than go to their family doctor because she felt ashamed and embarrassed.

To use Linda's words, "These people at the clinics don't really care. Never once did they offer any counselling, and never once did they suggest helping me to keep the baby. Parents *must* give their consent.

Ann Maire Lozinski, Debra's mother, had absolutely no idea that her daughter was pregnant, and therefore no knowledge that Debra had decided to have an abortion. On April 11, 1985, while Debra was on Easter vacation, she went to the clinic, accompanied by her girlfriend. There, the abortion was performed without adequate care. They did not monitor Debra during the procedure. No airway was inserted, and during the surgery Debra swallowed her tongue. The attendants at the clinic were unable to restore her breathing and consciousness to normal. Debra's mother was called at work by the Director of the clinic, who informed her that her daughter was at the clinic for "minor surgery," and that she (Debra) was having "respiratory problems." They rushed Debra to the hospital, where she lay in a coma for two-and-a-half months. Debra died on June 21, 1985.

The emotional toll on the family has been immeasurable. Since that time, Mrs. Lozinski has gone downhill emotionally. She has had professional counselling, but is still depressed. She and Debra had an extremely close relationship, and she is convined that Debra's reason for deciding on an abortion was to avoid hurting her mother. Had it been mandatory for Debra to obtain parental consultation in order to have an abortion, Mrs. Lozinski is certain they would have worked it out and that neither Debra nor the baby would have been lost. The trauma of Debra's abortion and death have been, if not insurmountable, then unforgettable. Debra's nineteen-year-old brother is "very bitter." And as Debra's mother says, "the law will not allow children at school to be given an aspirin without parental consent, yet a clinic is allowed to perform an abortion on a minor without even letting the parents know, leave alone getting their consent." She is positive that had she known Debra had gone to the clinic for an abortion, they would never have

given their consent and Debra and the baby would be alive today.

Mrs. Lozinski unequivocally believes that this should be made the law of the land. Primarily it would save lives, but it would avoid, in her words "the heartaches that never goes away."

Amicus **Robert C. Wibblesman** is the father of *amicus* Teresa Wibblesman Fangman. He recalls, with deep regret, the "terrible guilt she had to carry all by herself," for the six years from the time of her abortion until he eventually learned what had happened. Recalling that period, Mr. Wibblesman says:

> I knew that she was having psychological problems . . . [b]ut I thought this was a carry over from the early death of her Mother. How wrong I was. How tough it was for her to carry the inevitable guilt of finally realizing that "I killed my baby." She carried that guilt all by herself.

Mr. Wibblesman is convined that if his consultation with his daughter had been required, "all of this could have been avoided." His experience supports that conclusion. As related in Teresa's story, Mr. Wibblesman had a second daughter who also became pregnant. Fortunately, she confided in her father and stepmother, and they provided care and support for her throughout the pregnancy. This second daughter's experience was not without pain. As Mr. Wibblesman describes it, he is "sure she still has the hurt of knowing that there is a child out there somewhere whom she loves. But she certainly doesn't have the guilt trip that Terri had to carry by herself all these years." Thus, Mr. Wibblesman can testify to the drastically different results that can occur, depending on whether or not parents are involved in this most critical decision for adolescent women.

Amicus **American Victims of Abortion** (AVA) is a national organization of persons whose lives have been adversely affected by abortions—their own or a family member's. The

objective of AVA is to provide a forum for these individuals to educate legislatures and the public about the tragic consequences of abortion for some women. Based on the experiences of AVA members who obtained abortions as minors, AVA supports legislation, such as the parental consultation statutes at issue in this case, which may protect young women from making uninformed abortion decisions.

APPENDIX B

THE CONFUSED STATE OF PARENTAL CONSULTATION LAW

1. The following twenty one states require parental consent before a minor can obtain an abortion: Alabama, Ala. Code § 26-21-3 (Supp. 1988); Alaska, Alaska Stat. § 18.16.010 (1987); Arizona, Ariz. Rev. Stat. Ann. § 36-2151 (Supp. 1987; Arkansas, Ark. Stat. Ann. § 41-2555 (Supp. 1985); California, Cal. Health & Safety Code § 25958 (Supp. 1988); Delaware, Del. Code Ann. tit. 13, § 708 (1981); Florida, Fla. Stat. Ann. § 390.001(4)(a) (West Supp. 1985); Indiana, Ind. Code Ann. § 35-1-58.5-2.5 (Burns, Supp. 1988); Kentucky, Ky. Rev. Stat. Ann. § 311-732 (1983); Louisiana, La. Rev. Stat. Ann. § 40.1299.35.5 (West, Supp. 1988); Massachusetts, Mass. Ann. Laws. Ch. 12 § 125 (Law Co-op. 1985); Mississippi, Miss. Code Ann. § 41-41-53 (1988); Missouri, Mo. Stat. § 188.028 (Vernon, Supp. 1988); North Dakota, N.D. Cent. Code § 14.02.1-03.1 (Supp. 1987); Oklahoma, Okla. Stat. Ann. tit. 63, § 1-738 (West 1984); Pennsylvania, Pa. Stat. Ann. tit 1, § 3206 (Purdon1983); Rhode Island, R.I. Gen. Laws § 23-47-6 (1985); South Dakota, S.D. Codified Laws Ann. § 34-223A-7 (1986); South Carolina S.C. Code Ann. § 44-41-30 (Law Co-op. 1985); Tennessee, Tenn. Code Ann. § 39-4-202 (1982); Washington, Wash. Rev. Code § 9.02.070 (1985). *See* Appellant's Jurisdictional Statement (J.S.) at 14, in *Ohio* v. *Akron Center For Reproductive Health*, No. 88-805 (U.S.) (Akron II).

2. The following twelve states require parental notification in the event a minor chooses to have an abortion: Georgia, Ga. Code Ann. § 24A-4401 (Supp. 1988); Idaho, Idaho Code § 18-609(6) (1988); Illinois, Ill. Ann. Stat. ch. 38, § 81-64 (Smith-Hurd Supp. 1988); Maine, Me. Rev. Stat. Ann. tit. 22 § 1595 (1980 & Supp. 1988); Maryland, Md. Health-Gen. Code Ann. § 20-103 (1987); Minnesota, Minn. Stat. Ann. § 144.343(3) (Supp. 1988); Montana, Mont. Code. Ann. § 50-20-105 (1987); Nebraska, Neb. Rev. Stat. § 28-347 (1985); Nevada, Nev. Rev. Stat. § 442.255 (1986 & Supp.

1988); Ohio, Ohio Rev. Code. Ann. § 2919.12 (Page Supp. 1985); Utah, Utah Code Ann. § 76-7-304 (1978); West Virginia, W. Va. Code § 16-2F-3 (1985). *See Akon* II, Appellant's J.S. at 14.

3. Sixteen states have had their parental consultation law stayed or enjoined. Arkansas (*Smith* v. *Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980); Florida (*Scheinberg* v. *Smith*, 659 F.2d 476 (5th Cir. 1981), and *Jacksonville Clergy Consultation Serv.* v. *Martinez*, No. 88-809—CIV-J-16, 1988. U.S. Dis. Lexis 11088 (M.D. Fla., October 6, 1988); Georgia (*Planned Parenthood Ass'n of Atlanta Area, Inc.* v. *Harris*, 691 F. Supp. 1419 (N.D. Ga. 1988); Illinois, (*Zbaraz* v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985) *aff'd* mem. 108 S. Ct. 479 (1987); Indiana (*Gary-Northwest Women's Serv. Inc.* v. *Bowen*, 421 F. Supp. 734 (N.D. Ind. 1976, *aff'd*, 429 U.S. 1067 (1977); Kentucky (*Eubanks* v. *Collins*, 604 F. Supp. 141 (W.D. Ky. 1984); Maine (*Women's Community Health Center* v. *Cohen*, 477 F. Supp. 542 (D. Me. 1979); Mississippi (*Barnes* v. *Mississippi, No. J86-0458W* (stayed)); Nebraska (*Orr* v. *Knowles*, No. C.V.-81-0-301 1983 WL. 1570 (D. Neb. Sept. 19, 1983)); Nevada (*Glick* v. *McKay*, 616 F. Supp. 322 (Nev. 1985)); Ohio (*Akron Center for Reproductive Health* v. *Slaby*, 854 F.2d 852 (6th Cir. 1988) (*Akron* II)); Pennsylvania (*Planned Parenthood of Southeastern Pennsylvania* v. *Case*, 686 F. Supp. 1089 (D. S.C. 1977)); South Carolina (*Floyd* v. *Aders*, 440 F. Supp. 535 (D.S.C. 1977)); Tennessee (*Planned Parenthood of Nashville* v. *Alexander* No. 79-843-II (Tenn. Chauncery Ct. Oct. 24, 1979)); Utah (*L. R.* v. *Hanson*, No. C80-0078 J (D. Utah Feb. 8, 1980) (Utah statute unconstitutional as it applies to mature emancipated minors)); and Washington (*State* v. *Koome*, 84 Wash.2d 901, 530 F.2d 260 (1975). *See Akron II*, Appellant's J.S. at 15.

4. Only five state's parental consultation laws have passed constitutional muster. Louisiana consent state (*Margaret S.* v. *Treen*, 597 F. Supp. 636 (T.D. La. 1984); Massachusetts consent statute (*Planned Parenthood League* v. *Bellotti*, 641 F.2d 1006 (1st Cir. 1981); Missouri consent statute

(*Planned Parenthood Ass'n of Kansas City* v. *Ashcroft*, 462 U.S. 476 (1983); Minnesota notice statute (*Hodgson* v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) *(en banc);* Utah notice statute (*H. L.* v. *Matheson, 450 U.S. 398 (1981) (constitutional as it applied to "immature" minors). See* Akron II, Appellant's J.S. at 15.

5. The following eight decisions on parental consultation have been rendereed by the U.S. Supreme Court with conflicting results. *Planned Parenthood* v. *Danforth*, 428 U.S. 82 (1976) (no blanket parental consent requirement); *Bellotti* v. *Baird I*, 428 U.S. 132 (1976) (Abstained and certified nine questions to State Supreme Court); *Bellotti* v. *Baird II*, 443 U.S. 622 (1979) (declined to equate notification requirements with consent requirements, but required a judicial bypass alternative in parental consent laws); *H. L.* v. *Matheson*, 450 U.S. 398 (1981) (Utah notification law upheld without judicial bypass procedure); *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476 (1983) (Missouri consent law upheld with judicial bypass procedure); *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (*Akron* I—Ohio consent law with limited judicial bypass procedure held unconstitutional); *Thornburgh* v. *American College of Obsetetricians and Gynecologists*, 476 U.S. 747 (1986) (Pennsylvania consent law with judicial bypass procedure remanded); *Hartigan* v. *Zbaraz*, 763 F.2d 1532 (7th Cir. 1985) *aff'd mem 108 S. Ct. 479 (1987) (aff'd* without opinion *per curiam*) (Illinois notification law with judicial bypass procedure held unconstitutional by Court's split decision)

AMICUS CURIAE

BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
INTRODUCTION	4
I. THE REQUIREMENT THAT PARENTAL NOTIFICATION BE EFFECTUATED BY THE PHYSICIAN WHO IS TO PERFORM OR INDUCE THE ABORTION CLEARLY SURVIVES A FACIAL CHALLENGE	5
A. The Proper Standard Of Review For A Facial Challenge Of Unconstitutionality Is To Show That There Are No Circumstances Under Which The Law May Be Constitutional	6
II. ON ITS FACE, THE OHIO PHYSICIAN NOTIFICATION PROVISION REASONABLY FURTHERS SIGNIFICANT STATES INTERESTS AT STAKE IN THE ABORTION DECISION OF A MINOR	8
A. The Ohio Legislature Considered The Interests Involved In A Minor's Abortion Decision, And Designed Its Parental Notification Statute To "Permissibly Further" Those Legitimate Interests	9
B. The Abortion Decisions Of Minors Present Unique Circumstances Which Necessitate Parental Involvement	12
C. The Physician-Patient Relationship In The Abortion Context Has Enjoyed Special Protection Under The Decisions Of This Court	13

TABLE OF CONTENTS—Continued

	Page
D. Parental Involvement Is Necessary To Effectuate A Meaningful Physician-Patient Relationship Between A Physician And A Minor Patient	14
E. Physician Notification To The Parent Cannot Be Delegated To A Non-Physician	16
III. PHYSICIAN CONSULTATION WITH THE PARENTS DOES NOT UNDULY BURDEN THE MINOR'S PRIVACY RIGHT. THE MINOR'S RIGHT TO CHOOSE ABORTION IS NOT ABSOLUTE, BUT MUST BE WEIGHED AGAINST IMPORTANT STATE INTERESTS	19
A. On Its Face, The Physician Notification Statute Does Not "Unduly Burden" The Minor's Qualified Right To Privacy	19
B. Parents' Fundamental Right To Direct The Care And Upbringing Of Their Child Is Plainly Advanced By Consultation With The Physician Who Is To Perform An Abortion On Their Minor Daughter	22
CONCLUSION	26

TABLE OF AUTHORITIES

CASES	Page
Akron Center for Reproductive Health v. Slaby, 651 F.2d 1198 (6th Cir. 1981)	5, 22
Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988)	5, 6, 8, 11
Bellotti v. Baird (Bellotti I), 428 U.S. 132 (1976)	1, 19, 24
Bellotti v. Baird (Bellotti II), 443 U.S. 622 (1979)	*passim*
Children's Hospital of Akron v. Johnson, 426 N.E. 2d 515 (1980)	25
City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)	*passim*
DeBartolo Corp. v. Florida Gulf Coast Bldg & Const. Trades, 108 S.Ct. 1392 (1988)	7
Doe v. Bolton, 410 U.S. 179 (1973)	13, 20
Frisby v. Schultz, 108 S.Ct. 2495 (1988)	7
Ginsberg v. New York, 390 U.S. 629 (1968)	22
H.L. v. Matheson, 450 U.S. 398 (1981)	*passim*
Hartigan v. Zbaraz, 108 S.Ct. 479 (1987)	24
Maher v. Roe, 432 U.S. 464 (1977)	19
Meyer v. Nebraska, 262 U.S. 390 (1923)	22
Natanson v. Kline, 350 P.2d 1093 (1960)	17
New York State Club Ass'n v. City of New York, 108 S.Ct. 2225 (1988)	7
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	22
Planned Parenthood of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476 (1983)	20, 21, 24
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)	*passim*
Prince v. Massachusetts, 321 U.S. 158 (1944)	11, 22, 24
Quilloin v. Walcott, 434 U.S. 246 (1978)	11
Roe v. Wade, 410 U.S. 113 (1973)	8, 11, 13
Texaco, Inc. v. Short, 454 U.S. 516 (1982)	9
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)	13, 14, 18
United States v. Salerno, 481 U.S. 739 (1987)	7
Western and Southern Life Ins. Co. v. State Bd. of Equalization of Calif., 451 U.S. 648 (1981)	9
Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989)	*passim*
Wisconsin v. Yoder, 406 U.S. 205 (1972)	22

TABLE OF AUTHORITIES—Continued

STATUTES	Page
Ohio Rev. Code Ann. § 2919.12(B) (Page Supp. 1988)	5
Ohio Rev. Code Ann. § 2919.12(B)(2) (Page Supp. 1988)	21
OTHER AUTHORITIES	
Butler & Fujita, *Abortion Screening and Counseling: A Brief Guide for Physicians*, 50 Post Grad. Med. 208 (1971)	15
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F. Jaffe, B. Lindheim & P. Lee, *Abortion Politics: Private Morality and Public Policy* (1981)	4
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R. Mnookin, *In the Interest of Children* (1985)	4
24 Ob.Gyn. News 21 (August 1-14, 1989)	21
Statistical Abstract of the United States: 1987 (107th ed. 1987)	4
Torres & Forrest, *Why Do Women Have Abortions?*, 20 Family Planning Persp. 169 (July/Aug. 1988)	4
L. Wardle & M. Wood, *A Lawyer Looks at Abortion* (1982)	4

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BRIEF AMICUS CURIAE OF ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN SUPPORT OF APPELLANT

INTEREST OF THE AMICUS

The Association of American Physicians and Surgeons, Inc. (AAPS), a not-for-profit corporation, is the largest association of private practicing physicians in the United States. AAPS is comprised of active, practicing physicians and osteopaths of all specialties, from every state and territory in the United States and the District of Columbia. One purpose of the AAPS is to protect and preserve the private practice of medicine in all of its aspects. AAPS supports the rights of patients, both adults and minors, to be provided full and accurate medical

information with which to render informed decisions pertaining to their medical treatment. Moreover, the AAPS recognizes the importance of involving parents in the medical treatment of minors, particularly in the provision of surgical procedures. Many of the members of AAPS are pediatricians and obstetrician/gynecologists who routinely provide medical services to minors. In addition, many AAPS members are family practitioners whose practices involve working with the family, as a unit, in the provision of medical treatment. For these reasons, the issues involved in this case are of acute interest to the association.

SUMMARY OF ARGUMENT

This Court has long recognized the fundamental right of parents to direct the upbringing of their unemancipated minor children. Accordingly, the right of parents to be involved in the important decisions of their children has been afforded broad protection by the decisions of this Court, including the decision whether to abort. In light of minors' vulnerability, immaturity and inability to render reasoned, thoughtful decisions, parental involvement in this area is essential. In recognition of the unique status of minors and the potential for medical risks which this elective surgical procedure poses to the minor's health—emotional, psychological and physical—the Ohio legislature enacted the Ohio parental notification law. In addition, the Ohio legislature carefully considered the independent constitutional rights of parents to direct the upbringing of their minor daughter.

The provision of the statute requiring the physician to effectuate notice to the parent permissibly furthers the state's interests in the minor's decisionmaking and maternal health. The provision enhances the protection of her health and safety by providing an opportunity for 1) medical information about the minor to be given by a knowledgeable, caring parent, 2), essential medical information to be discussed with the parent by the physi-

cian who will perform the abortion, 3) the decision to be rendered only after the parent and child have carefully considered all of the risks, consequences and alternatives, and 4) the parent to be prepared to give the necessary care, counsel and emotional support to the child during this difficult time. Thus, there is no undue burden on the minor's privacy right.

Nor does the physician notification provision adversely effect the physician's practice of medicine. The physician is merely required to effectuate notification, in person, by telephone or mail. While the law does not require the physician to engage in a dialogue with the parent, let alone structure the content of any such dialogue, the physician notification provision provides a suitable vehicle whereby any such dialogue may ensue. For the physician to attempt to circumvent his duty to his patient by alleging an increased cost, is not only unethical, but contrary to the best interest of the patient. Furthermore, such a claim does not advance the "physician-patient relationship" wherein the decision to abort ought to be decided "by the woman in consultation with her physician."

Moreover, the statute withstands a facial challenge, the appellees having failed to demonstrate that there are not circumstances under which the law may be unconstitutional. This statute reasonably furthers the traditionally recognized legitimate and important state interests of the state in protecting and enhancing the rights of parents and their minor children and accordingly should be upheld.

ARGUMENT

INTRODUCTION

Abortion is the single most frequently performed elective surgical procedure in the United States. Imber, *Abortion and the Private Practice of Medicine* xi (1986). *See generally, Statistical Abstract of the United States: 1987* 98 (107th ed. 1987); L. Wardle & M. Wood, *A Lawyer Looks at Abortion* (1982); F. Jaffe, B. Lindheim & P. Lee, *Abortion Politics: Private Morality and Public Policy* 7 (1981) (By 1978 "[t]ermination of pregnancy had become the most frequently performed operation on adults in the United States."). Each year, approximately one fourth of the more than 1.5 million abortions performed in this country are performed on minors, accounting for over 400,000 abortions annually. Henshaw & VanVort, *Teenage Abortion, Birth and Pregnancy Statistics: An Update*, 21 Family Planning Persp. 85 (March/April 1989). Astonishingly, more than ninety-five percent of abortions are not medically indicated. Torres & Forrest, *Why Do Women Have Abortions?*, 20 Family Planning Persp. 169 (July/Aug. 1988) (4% of women gave "health of mother" as primary reason for abortion).

It is well documented that, as a general rule, minors are unlikely to consult their parents prior to obtaining abortions. *Id.*; R. Mnookin, *In the Interest of Children* 158 (1985). Furthermore, minors, by nature, often act impulsively and imprudently due to their inability to seek wise counsel, their inability to weigh short and long range risks and consequences of their decisions, and by their very youth, immaturity and inexperience. Because minors are disadvantaged consumers in the abortion marketplace and because they are encountering decisions which may adversely impact on their physical, emotional and psychological well-being, parental involvement in this important decision is paramount. The Ohio statute is a legitimate furtherance of the state's interest in protecting minors and their parents.

I. THE REQUIREMENT THAT PARENTAL NOTIFICATION BE EFFECTUATED BY THE PHYSICIAN WHO IS TO PERFORM OR INDUCE THE ABORTION CLEARLY SURVIVES A FACIAL CHALLENGE.

The Sixth Circuit Court of Appeals struck down the Ohio parental notification statute in its entirety.[1] *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988) ("*Slaby*"). Among the provisions held unconstitutional was the requirement that the physician (the person who is to "perform or induce" the abortion) personally notify at least one parent no less than 24 hours prior to proceeding with the abortion on the minor daughter. Ohio Rev. Code Ann. § 2919.12(B) (Page Supp. 1988).[2]

The lower court relied on its earlier decision in *Akron Center for Reproductive Health v. City of Akron*, 651 F.2d 1198 (6th Cir. 1981), invalidating a requirement that the physician personally counsel a woman to ensure her informed consent, and the decision of this Court, *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) ("Akron I"). The state interest in the informed consent statute was identified as "ensuring that the woman's consent is informed and unpressured. . . ." 651 F.2d at 861-62 (citing *Akron I*, 462 U.S. at 448-49).

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[1] The District Court upheld the 24-hour waiting period, but concluded that the absence of a severability clause required it to strike the entire statute. The constitutionality of the 24-hour actual notice was not appealed by appellees, and therefore is deemed constitutional.

[2] The statute provides in pertinent part:

> No person shall knowingly perform or induce an abortion upon a woman who is pregnant, unmarried, under eighteen years of age, and unemancipated unless at least one of the following applies: (i) subject to division (B)(2) of this section, the person has given at least twenty-four hours actual notice, in person or by telephone, to one of the woman's parents, her guardian, or her custodian as to the intention to perform or induce the abortion.

In concluding that physician notification unduly burdens the minor's right to seek abortion, the Sixth Circuit identified the relevant state interest as "insuring that immature, unemancipated minors or minors whose best interests require notification have an adequate opportunity for parental intervention." *Slaby*, 854 F.2d at 862.

The court gave no analysis to support its conclusion that physician notification unduly burdens a minor's right to seek an abortion. It simply concluded that there was no showing that the state's interest was advanced "by requiring the attending physician, as opposed to another qualified, responsible person, to effectuate notification." *Id.* However, the physician notification directly furthers several significant state interests: in maternal health, decisionmaking by minors, and parental involvement. Additionally, the lower court erred in its analysis by not applying the proper standard of review for a facial challenge.

A. The Proper Standard Of Review For A Facial Challenge Of Unconstitutionality Is To Show That There Are No Circumstances Under Which The Law May Be Constitutional.

Appellees' facial challenge to the physician notice provision of the Ohio statute fails to meet the appropriate burden. Recently, this Court cautioned against the difficulty of substantiating a facial claim of unconstitutionality:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since *the challenger must establish that no set of circumstances exists under which the Act would be valid.* The fact that the [relevant statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.

United States v. Salerno, 481 U.S. 739, 745 (1987) (emphasis supplied). First Amendment issues are not raised in the present case. The court below apparently ignored this Court's admonition that "the elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality," *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades*, 108 S.Ct. 1392, 1397 (1988), and that it must be shown "from the text of the Law and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally". *New York State Club Ass'n v. City of New York*, 108 S.Ct. 2225, 2235 (1988).

These rules of construction apply to state abortion statutes as well. Just this past Term, this Court reviewed a Missouri abortion statute and concluded that the "Court of Appeals' interpretation also r[an] 'afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties.'" *Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3054 (citing *Frisby v. Schultz*, 108 S.Ct. 2495, 2501 (1988).[3]

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[3] *See also* Justice O'Connor's concurring opinion, in which she discussed the arguments raised by appellees against Missouri's preamble: "I agree with the Court, therefore, that all of these intimations of unconstitutionality are simply too hypothetical to support the use of declaratory judgment procedures and injunctive remedies in this case." 109 S.Ct. at 3059. (O'Connor, J., concurring in part and concurring in the judgment.) She likewise rejected the facial challenge to the ban on the use of public facilities and employees for non-life-threatening abortions.

> [T]here may be conceivable applications of the ban on the use of public facilities that would be unconstitutional. . . . *Maher*, *Poelker*, and *McRae* stand for the proposition that some quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional.

Id. at 3059-60. There are numerous "quite straightforward applications" of the physician consultation requirement sufficient to overcome appellees' facial challenge.

The court below made no effort to interpret the physician notification provision constitutionally. Rather, it assumed that the state must show why "another qualified, responsible person" could not effectuate notification. *Slaby*, 854 F.2d at 862. Similarly, appellees faltered in proving their burden of showing that "*no* set of circumstances exists" under which the statute may be applied constitutionally. In most cases, an opportunity for conversation between the physician and the minor's parents permissibly furthers significant state interests.

II. ON ITS FACE, THE OHIO PHYSICIAN NOTIFICATION PROVISION REASONABLY FURTHERS SIGNIFICANT STATE INTERESTS AT STAKE IN THE ABORTION DECISION OF A MINOR.

Although this Court has held that, as a "long-recognized and essential element of personal liberty," a woman has the right to seek and choose an abortion, *Akron I*, 462 U.S. at 427, it has also cautioned that "the right of personal privacy . . . is not unqualified and must be considered against important state interests in abortion." *Roe v. Wade*, 410 U.S. 113, 154 (1973). Those state interests include "safeguarding health, in maintaining medical standards, and in protecting potential life." *Id.*

In the case of a minor, the state may take additional measures which might not be permitted with respect to a mature, adult woman's abortion decision. Significant state interests exist which dictate that the constitutional rights of children are not parallel to those of adults. This Court has traditionally recognized the unique position of children and their families, and their corresponding protection:

> The unique role in our society of the family, the institution by which we inculcate and pass down many of our most cherished values, moral and cultural, requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognize[d] three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Bellotti v. Baird, 443 U.S. 622, 634 (1979) (*Bellotti II*) (citation omitted). That guiding parental role "presumptively includes counseling them on important decisions." *H.L. v. Matheson*, 450 U.S. 398, 410 (1981).

A. The Ohio Legislature Considered The Interests Involved In A Minor's Abortion Decision And Designed Its Parental Notification Statute To "Permissibly Further" Those Legitimate Interests.

In upholding a Missouri statute requiring the physician to determine viability, this Court concluded that "the requirement of these tests permissibly furthers the State's interest in protecting potential human life, ..." *Webster*, 109 S.Ct. at 3057.

In determining whether physician notification "permissibly furthers" these interests, the lower court should have given proper deference to the judgment of the legislature, keeping in mind that the legislature has evaluated the competing arguments, made the factual inquiries, and reached its conclusion. *Texaco Inc. v. Short*, 454 U.S. 516 (1982); *Western and Southern Life Ins. Co. v. State Bd. of Equalization of Calif.*, 451 U.S. 648 (1981). The Ohio legislature properly balanced the various interests at stake in a minor's abortion decision, and reasonably concluded that the opportunity for physician-parental consultation furthers those interests.

There are several significant state interests which are carefully advanced by the physician notification provision: the state's compelling interest in maternal health, the state interest in informed decisionmaking by minors,

and the traditional protection for parental rights and obligations in childrearing. In addition, the Ohio statute is rationally grounded on the three traditional reasons given by this Court for treating children differently than adults: their vulnerability, immaturity in making critical decisions, and the importance of the parental role. Those reasons are clearly reflected in the statute.

First, the minor's vulnerability may make it impossible for her to distinguish between the competent and ethical physician and the incompetent or unethical physician. *Bellotti II*, 443 U.S. 622, 641 n.21 (1979). Second, the minor's inability to make informed decisions in a mature manner makes it "unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic . . ." *Id.* at 641 (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 91 (1976)). While a "dialogue" between the physician and parent, itself or its content, is not required by the statute, the potential for such a dialogue exists and this would further the aforementioned state interests.

This opportunity is particularly important within the abortion clinic setting, where the vast majority of abortions on minors are performed. Henshaw & O'Reilly, *Characteristics of Abortion Patients in the United States, 1979-1980*, 15 Fam. Planning Persp. 5, 11 (1983). Not infrequently, the patient, both minor and adult, does not even see the physician until she is gowned and prepared for surgery.[4] The physician's personal notification of the parent would ensure at least a minimal protection of the vulnerable minor making a critical, life-impacting decision.

These two factors relating to the protection of minors —vulnerability, and immaturity and inability to make critical decisions—are supported by the state's significant interest in maternal health. "[A] State has a legitimate

[4] *See* Chicago Sun Times, Nov. 14, 1978, at 1, col. 1 ("The Abortion Profiteers").

concern with the health of women who undergo abortions, [so] 'a State may properly assert important interests in safeguarding health [and] in maintaining medical standards.'" *Akron I*, 462 U.S. 416, 428-429 (quoting *Roe*, 410 U.S. at 154). Thus, "[c]ertain regulations that have no significant impact on the woman's exercise of her right may be permissable where justified by important state health objectives." *Id.*, at 430. Physician notification is justified by "important state health objectives." This requirement "serves a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician." *H.L. v. Matheson*, 450 U.S. at 411. This holds especially true for the immature minor who may be unaware of or lack access to her own complete medical history. Her parent could provide accurate information to the physician.

Finally, the third reason given by this Court to justify special protections for minors is "the importance of the parental role in child rearing." *Bellotti II*, 433 U.S. 622, 634. It is not unreasonable to assume that the dialogue will be only for the minor's benefit. The Court has stated and reaffirmed that "[i]t is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the [S]tate can neither supply nor hinder." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). The parents are responsible for the mental, emotional and physical aftercare of their minor daughter, as well as the financial burden of her abortion decision. Thus, the parents deserve the opportunity to fully consult with the physician, in order to effectively understand and care for their child after the abortion is performed. The undue burden upon the minor's privacy right alleged by the appellate court to be substantiated under *Akron I* is miniscule in comparison to that burden which may eventually fall upon the parent long after the physician has completed the procedure.

B. The Abortion Decisions Of Minors Present Unique Circumstances Which Necessitates Parental Involvement.

The decision to abort or carry a pregnancy to term may be one of the most significant decisions a woman may face in her lifetime. Because of the potential short and long term ramifications abortion poses to a woman's health—physical, psychological and emotional—the decision should be made with the full and thoughtful examination of the potential risks, alternatives and consequences. This decision is a difficult one even for an adult woman who, because of her maturity, ability to reason and weigh consequences of actions in light of her life's experiences and her ability to consult others whose counsel she values, may be better prepared to make a well-reasoned and thoughtful decision. However, due to their particular vulnerability and lack of maturity, minors are incapable of engaging in a mature and reasoned thought process required to make such signifi ant medical decisions and, necessarily require the guidance, support and wise counsel of their parents.

Because minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, parental consent is a qualification that typically may be imposed on a minor's right to make important decisions, such as marriage. *Bellotti II*, 443 U.S. at 640. For this reason, the parental involvement (even though falling short of consent) in the minor's abortion decision is imperative as the means of providing the minor a mature, well-reasoned approach to this very important decision. As Justice Stewart wrote in his concurring opinion in *Planned Parenthood v. Danforth*:

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physicial at an abortion clinic, where abortions for pregnant minors frequently take place.

428 U.S. 25, 92 (1976).

Abortion may carry with it profound long-lasting consequences which are not readily apparent to the minor as she is confronted by the confusing and stressful situation of an unplanned pregnancy. This Court has noted the impact of abortion on the minor stating "[t]he medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature." *H.L. v. Matheson*, 450 U.S. at 411 (citation omitted).

C. The Physician-Patient Relationship In The Abortion Context Has Enjoyed Special Protection Under The Decisions Of This Court.

The decision whether or not to choose abortion is one that is made by a woman in consultation with her physician. *Roe v. Wade*, 410 U.S. 113 (1973). This unique relationship, first established in *Roe*, and adhered to in a line of cases following, has been a major impetus in the striking down of numerous abortion-related statutes. *Doe v. Bolton*, 410 U.S. 179 (1973); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

Proponents of an unfettered right to abortion unwaveringly oppose any state legislation which, even minimally, may impinge on the physician-patient relationship. This relationship has enjoyed special protection. Unfortunately, when abortion is the procedure under considera-

tion, the relationship has been deemed so impervious to legislative efforts as to render virtually all statutes unconstitutional which attempt to enhance the decision-making ability of the woman patient. For example, in *Thornburgh*, this Court held invalid certain provisions of a Pennsylvania abortion statute which simply required the woman patient to be informed of the name of the physician who would be performing the abortion, and the "particular medical risks" of the procedure or of carrying her pregnancy to term. Even such arguably slight encroachments into the physician-patient relationship have been held unconstitutional and villified as "attempt[s] to wedge the State's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician," *Thornburgh*, 476 U.S. at 762, and "efforts to deter a woman from making a decision that, with her physician, is hers to make." *Id.* at 759.

Interestingly, this physician-patient relationship is the guise under which appellees seek to invalidate the physician notification provision of the Ohio statute. Appellees' proposition runs contrary to the long-maintained and oft-argued rhetoric of the "relationship." They submit that the right of the minor to abort should not be impaired, to any degree, by the "intrusion" of the parents, while at the same time maintaining that the physician is too "burdened" to effectuate simple notification of the parent by telephone or mail. Under this argumentation, neither the physician nor the patient—via her parents—participates in the "physician-patient relationship." Such inconsistent arguments defy reason and insult logic and law.

D. Parental Involvement Is Necessary To Effectuate A Meaningful Physician-Patient Relationship Between A Physician And A Minor Patient.

This Court has already recognized the difference between minors and adults which render the term "physician-patient relationship" insufficient, both within and

outside the abortion context. The term "patient" presupposes that the individual possesses certain minimum capacities and abilities in order to be a meaningful participant in the "relationship." A minor, by the very nature of her vulnerability and inability to make critical decisions in an informed and mature manner, lacks the capacity to fulfill the role of "patient" without parental assistance. Consequently, the "physician-patient relationship" becomes a hollow, meaningless phrase when the patient is a minor operating in a vacuum without parental guidance and counsel.

Clinical ethics supports parental involvement. Consistent wiht accepted medical practice, physicians often necessarily rely on information regarding, but not obtained from, the patient. Good medical care and after care for adolescents generally entails including the parents in the medical care of their minor child. Marks & Fisher, *Health Assessment and Screening During Adolescense*, 80 Pediatrics 135, 154-44 (July 1987 Supp.). Butler &. Fujita, *Abortion Screening and Counseling: A Brief Guide for Physicians*, 50 Post Grad. Med. 208, 212 (1971) minors. This Court has observed that parents can:

> supply essential medical and other information to a physician. The medical, emotional, and psychological consequences of an abortion are serious and can be lasting: this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. *Parents can provide medical and psychological data, refer the physcian to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.*

H.L. v. Matheson, 450 U.S. at 411 (footnote omitted, emphasis supplied). Frequently, the minor will not be able to assist the physician by providing salient medical information. For the physician to render sound medical advice and provide elective surgical services to a minor

without first obtaining the requisite medical history of the minor would be not only unethical, unprofessional and pose potential malpractice liability to the physician, it would also directly disregard the minor's health and safety.

Furthermore, the parent is in the best position to provide the minor with follow-up emotional support and medical care. In addition to simply being notified of the minor's abortion, any direct dialogue between parent and physician which may ensue, but which is not required by the statute, serves only to benefit the minor by enabling the parent to anticipate and react to the emotional and physical health of the minor following the abortion.

Only if there is an opportunity for discourse with the physician, can the parent render meaningful consultation and assistance to both the physician and minor. This direct contact between the parent and physician benefits all parties involved in the abortion: the minor, her parents and the physician.

Finally, it is the parents, as advocates for their daughter, who are most likely to ensure that a genuine physician-patient relationship in fact exists. It is the parents who can ensure that their minor daughter actually consults with the doctor prior to the abortion. It is the parents who will be able to ascertain the identity of the doctor,[5] and investigate his or her credentials.

E. Physician Notification To The Parent Cannot Be Delegated To A Non-Physician.

Consistent with the recognized interest of the state in providing special protections for adolescents in light of their unique status, the Ohio legislature deemed neces-

[5] *See* Chicago Sun-Times, Nov. 14, 1978 p. 1, col. 1 ("The Abortion Profiteers," describing high-volume abortion clinics: "These doctors rarely tell patients their names. To many, patients are not people. They are profits.").

sary and permissibly required that the attending physician, rather than his or her agent, inform the minor's parents of "the intention to perform or induce the abortion." This provision is clearly in line with a trend in medicine and law that information provided the patient should be tailored to what the patient deems necessary in relation to her medical decisionmaking. The standard against which the scope of the physician's disclosure to a patient in the context of informed consent is measured can be divided into two schools of thought. The "reasonable physician" model is based on the physician's duty to disclose information under a negligence theory. This model, based on cases and statutes, is determinative of the scope of information proved to a patient by the physician based upon the disclosures which a "reasonable medical practitioner would make under the same or similar circumstances." *Natanson v. Kline*, 186 Kan. 393, 409-10, 350 P.2d 1093, 1106 (1960); *See generally*, Jipping, *Informed Consent to Abortion: A Refinement*, 38 Case W. Res. L.Rev. 329, 356-62 (1988). This model emphasizes the discretionary judgment of the physician in the provision of medical information.

The trend in both law and medicine has been toward the "reasonable patient" model which holds that the physician has a duty to disclose information to the patient which the reasonable patient would deem material to decisions pertaining to his or her own medical treatment. Under this model, the emphasis is placed on the rights of the patient and therefore the nature and scope of the information disclosed by the physician is premised on the needs of the patient rather than upon the physician's desire to avoid liability. *Id.* at 358-59; Comment, *Informed Consent: From Disclosure to Patient Participation in Medical Decisionmaking*, 76 Nw.U.L.Rev. 172, 174 (1981).

The patient-oriented model presumes that the minor—not the physician—determines what information is rele-

vant to her decision. However, the term "reasonable patient" presumes certain minimum capacities and abilities. Because of the inferior capacities and abilities of minors, parental involvement in the physician-patient relationship is integral, providing the "missing link" in the dynamics of the erlationship. Participation of the parents permits the physician to give proper medical advice and care for the minor. The parent's involvement can be dispositive of the materiality of the information disclosed by the physician to the patient via her parent in order to render well-reasoned medical decisionmaking.

The trend toward the "reasonable patient" model underscores the legitimate state interest of protecting minors in the context of medical treatment. Parental discussion with the physician enhances the minor's decisionmaking, thereby enabling the physician to provide complete care for her. This Court's traditional view of protecting adolescents is advanced through the physician notification provision of the Ohio statute. Furthermore, the statute does not run afoul of other decisions of this Court such as *Thornburgh* by "officially structuring the dialogue," thereby inhibiting the practice of medicine and restricting his medical judgment. *See Thornburgh*, 476 U.S. at 763. Rather, the statute provides a suitable vehicle by which the parent can have an opportunity to both provide and receive information required in order for the minor to make sound medical decisions. To deny the state the authority to make a determination of this nature would be to diminish the rights of states to enact legislation benefiting minors both within and outside the abortion context, thereby undermining the long-held traditional views recognizing the special needs of minors.

III. PHYSICIAN CONSULTATION WITH THE PARENTS DOES NOT UNDULY BURDEN THE MINOR'S PRIVACY RIGHT. THE MINOR'S RIGHT TO CHOOSE ABORTION IS NOT ABSOLUTE, BUT MUST BE WEIGHED AGAINST IMPORTANT STATE INTERESTS.

A. On Its Face, The Physician Notification Statute Does Not "Unduly Burden" The Minor's Qualified Right To Privacy.

This Court and individual Justices have sought at times to determine whether a state abortion statute "unduly burdens" the exercise of the abortion decision in determining its constitutionality.

> If the particular regulation does not "unduly burden" the fundamental right, then our evaluation of that regulation is limited to our determination that the regulation *rationally relates to a legitimate state purpose.* Irrespective of what we may believe is wise or prudent policy in this difficult area, "the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.'

Akron I, 462 U.S. at 454 (O'Connor, J., dissenting) (emphasis supplied). *See also Webster*, 109 S.Ct. at 3063 (O'Connor, J., concurring); *Bellotti II*, 443 U.S. at 640 (Powell, J.); *Maher v. Roe*, 432 U.S. 464, 473-74 (1977); *Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (*Bellotti I*).[6]

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[6] Justice O'Connor reaffirmed this standard of review in *Webster*:

> I dissented from the Court's opinion in *Akron* because it was my view that . . . the *Akron* majority had distorted and misapplied its own standard for evaluating state regulation of abortion which the Court had applied with fair consistency in the past: that, previability, "a regulation imposed on a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion."

109 S.Ct. at 3063 (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted).

The Court has "recognize[d] that even a 'significant obstacle' can be justified by a 'reasonable' regulation." *Akron I*, 462 U.S. at 463 (O'Connor, J., dissenting). Thus, an " 'undue burden' has been found for the most part in situations involving *absolute obstacles* or *severe limitations* on the abortion decision." *Id.* at 464 (O'Connor, J., dissenting) (emphasis added). And the Court "has never required that state regulation that burdens the abortion decision be 'narrowly drawn' to express only the relevant state interest." *Akron I*, 462 U.S. at 467 n.11 (O'Connor, J., dissenting).

For example, regulations which minimally increase the cost or delay the performance of the abortion have been held *not* to "unduly burden" even an adult woman's privacy right. *Webster*, 109 S.Ct. at 3057 (physician testing for fetal viability at 20 weeks); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 482-486 (1983) (post viability second physician requirement); *id.* at 489 (pathology testing throughout pregnancy). And several justices in *Akron I* would have upheld a second trimester hospitalization requirement as not imposing an "undue burden" even though the Court found that a second trimester abortion "cost more than twice as much in a hospital as in a clinic." *Cf. Akron I*, 462 U.S. at 434-35; 462 U.S. at 466-67 (O'Connor, J., dissenting).

Moreover, unlike other regulations which might be deemed to "unduly burden" the mature, adult woman's abortion decision, in the case of a minor, Ohio may take additional measures which, although they impact the abortion decision, do not cross the line and become *unduly* burdensome.[7] Any possible increase in cost or delay is

[7] The Court "subsequent to *Doe* [*v. Bolton*] has expressly rejected the view that differential treatment of abortion requires invalidation of regulations." *Akron I*, 462 U.S. at 465, n.9. Indeed, the question

obviously justified. Here, the notification of the parents by the physician himself or herself does not cause any more delay than notification by a volunteer or lay counselor. As to cost, it is unprincipled for a physician to charge a patient a higher fee simply because he or she might spend additional time with that patient, and the physician must either work later or perform fewer abortions.[8] Even if the physician passes on his or her entire costs to the minor patient, this burden cannot be considered undue in light of the benefits to the minor and the furtherance of significant state interests.

The Ohio physician notification provision not only directly furthers compelling interests in parental authority and the protection of minors, but it does so in a way that does not "unduly burden" the minor's abortion decision. It does not erect an "absolute obstacle" or pose a "severe limitation" on the minor's abortion decision. Whether or not her parent chooses to participate, she may proceed with the abortion, once 24-hour actual notice[9] has been accomplished.[10]

whether the state may "impose a parental veto on the decision of a minor to undergo an abortion" still remains open (*Ashcroft*, 462 U.S. at 505 (O'Connor, J., concurring in part, dissenting in part)) as does the question of "parental notification in the case of mature minors." *Akron I*, 462 U.S. at 469 n.12 (O'Connor, J., dissenting).

[8] *See* "Gyn. Problems in Teens 'Falling Through the Cracks,' " 24 Ob.Gyn. News 21 (August 1-14, 1989) where Dr. Gita P. Gidwani, head of the section of pediatric and adolescent gynecology at the Cleveland Clinic Foundation indicated that: "providing such counseling means that she must spend about twice as long with each adolescent patient as with an adult patient. 'If you're going to see these patients you have to taken enough time,' she said."

[9] The statute also provides for 48-hour constructive notice by mail. (Ohio Rev. Code Ann. § 2919.12(B)(2) (Page Supp. 1988).

[10] In dissenting from the invalidation of a 24 hour waiting period in *Akron I*, several justices of this Court would have upheld the

B. Parents' Fundamental Right To Direct The Care And Upbringing Of Their Child Is Plainly Advanced By Consultation With The Physician Who Is To Perform An Abortion On Their Minor Daughter.

This Court has, on numerous occasions, acknowledged the role of parents to guide and direct the upbringing of their minor children, stating that "constitutional interpretation has consistently recognized that the parent's claim to authority in their own household to direct the rearing of their [minor] children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). This right and duty to direct the upbringing of one's children "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). *See also, Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

Parental rights have been afforded broad protection by this Court and by the lower federal courts and are so vital to the integrity of the family structure and to society in general, as to be considered fundamental.[11] "Parents . . . have powers greater than the state to curtail a state's exercise of the constitutional rights he may otherwise enjoy, for a parent's own constitutionally protected 'liberty' includes the right to 'bring up children.'" *Meyer*, 262 U.S. at 399.

Furthermore, "central to many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies *a substantial measure of authority over one's children. Bellotti II*, 443 U.S. at 638 (emphasis supplied). This parental role does not contravene the minor's liberty, but advances that interest as well:

> Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.

Id. at 638-39 (footnote omitted).

This Court has recognized the rights of states to enact legislation which protects the interests of parents to participate in the abortion decisions of unemancipated, immature, dependent minors. On several occasions, this Court has examined such "parental involvement" legislation and set specific parameters within which the state may legislate to enhance and protect these rights.

In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) this Court acknowledged the states' right to enact par-

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waiting period, because it did not "unduly burden the availability of abortions or impose an absolute obstacle to access to abortions," recognizing that the record showed that the "physician-patient relationship" was "nonexistent." *Akron I*, 462 U.S. at 473 (O'Connor, J., dissenting) (citing the lower court 651 F.2d 1198, 1217 (Kennedy, J.):

> The requirement that the information specified . . . be given by a physician does no more than seek to ensure that there is in fact a true physician-patient relationship even for the woman who goes to an abortion clinic. The evidence presented at trial showed that the decision to terminate a pregnancy was made not by the woman in conjunction with her physician, but by the woman and lay employees of the abortion clinic . . . [t]he doctors . . . did little, if any counseling before seeing the patients in the procedure room.

The same clinic, with the same policies that enhance no physician-patient relationship, is before this Court here.

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[11] *See Bellotti II*, where the Court discussed the independent constitutional rights of parents: "[T]he Court's opinions discussed in the text above . . . all have contributed to a line of decisions suggesting the existence of a constitutional parental right against undue, adverse interference by the State." 443 U.S. at 639 n.18.

ental involvement legislation so long as such enactments did not provide a third party an absolute, arbitrary veto power over a woman's abortion decision. *Danforth* permitted parental involvement while at the same time ensuring that the minor's right to an abortion was not left to the ultimate decision of a third party, including a parent. The issue of parental involvement in the abortion decisions of minors has been addressed by this Court on several occasions. *Danforth*, 428 U.S. 52 (1976); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Planned Parenthood of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983); *Bellotti v. Baird*, 428 U.S. 132 (1976) (*Bellotti* I); *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti* II); *Hartigan v. Zbaraz*, 108 S.Ct. 479 (1987), *aff'd by equally divided Court without opinion.* Justice Powell wrote that "[l]egal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Bellotti II*, 443 U.S. at 639 n.18.

The decision to abort a pregnancy is final and irrevocable, and the presumed inferior emotional and psychological capacity of minors justifies the state in imposing limitations upon their freedom to make these important choices without guidance from more experienced persons. *See*, Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U.L. Rev. 605, 644-50. Parents —not some third party—have the right and duty to assist their children in making these decisions. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince*, 321 U.S. at 166.

The parental role is not simply a matter of "rights," but includes state-imposed obligations. Under Ohio law, parents have a duty to support their children including

the provision and cost of medical expenses. In *Children's Hospital of Akron v. Johnson*, 426 N.E.2d 515 (1980), the Court of Appeals stated that responsibilities for the cost of medical treatment are "collective duties which flow from parenthood," because the duty of parents to support their children is a "fundamental principle in our society." *Id.* at 516.

Parents therefore, having a financial obligation to pay for medical expenses, have a direct stake in the type of medical treatment provided. Moreover, should medical complications ensue or follow-up medical treatment be required, the parents will be liable for those costs as well. The duties of parents required under Ohio law indicates that parental involvement in the abortion decisions of minors is essential.

Thus, direct physician consultation with the parents not only protects the minor's health; it protects the parents' independent rights. If the constitutional right of parents to care for their children means anything, it surely must permit them to be involved in a decision affecting their minor daughter which may have serious and life-long consequences. The parents have a right to gain information from and provide input to the person who will perform surgery on their minor daughter.

The physician is the person who can best evaluate the health condition of the minor at the time she is considering an abortion. Parents have the right to draw on the physician's expertise, and not the impressions of a lay person employed by the abortion clinic. Physician notification also provides the parents an opportunity for meaningful discussion with their minor daughter about her decision whether or not to undergo an abortion.

Ohio's requirement that the physician who is to perform or induce an abortion on a minor inform her parents of the intention to do so clearly and permissibly furthers the state's significant interest in protecting the constitutional rights of parents.

CONCLUSION

For the foregoing reasons, the judgment below striking down in its entirety the Ohio parental notification statute should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF OHIO

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal From The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF CONCERNED WOMEN FOR AMERICA IN SUPPORT OF APPELLANT

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37 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

INTEREST OF AMICUS CURIAE 1

ARGUMENT 1

INTRODUCTION 1

I. THE FAMILY ENJOYS MANY CONSTITUTIONAL RIGHTS WHICH ARE PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT 3

A. The Family Has Privacy Rights That Are Protected By The Constitution, And Those Rights Extend To And Predominate Over An Unemancipated Minor's Privacy Right To An Abortion 3

B. The Family, And In Particular Parents, Have Been Found To Have Due Process Rights And Other Privacy Rights In Relation To Important Decisions Which May Affect The Family 5

(1.) Due Process And Other Rights Exist For Parents In The Educational Upbringing Of Their Children 5

(2.) Due Process Rights Exist For Traditional Nuclear Families, Extended Families, And Even Custodial Families 6

C. Both Ohio And The Supreme Court Recognize The Decision-Making Function Of Parents In The Upbringing Of Their Children As Intergral To The Family Relationship 9

II. THE COURT HAS RECOGNIZED THAT CONSTITUTIONAL DUE PROCESS RIGHTS EXIST FOR PARENTAL NOTIFICATION AND CONSENT OR JUDICIAL BYPASS BEFORE MINOR FAMILY MEMBERS HAVE ABORTIONS OR OTHER MEDICAL PROCEDURES . 11

A. The Court Has Acknowledged That Parental Due Process Rights May Be Exercised In Tandem With State Concerns For Minors In Medical Decisions, Even When The Minors Oppose The Parental Decisions 11

Table of Contents Continued

Page

B. The State May Impose Parental Or Judicial Consent Requirements On Minors' Abortion Decisions Even If Such Requirements Would Not Be Applicable To Adults In Their Abortions Decisions 17

C. Because Of The Vulnerability Of Children, Procedural Due Process Is Needed To Protect Them From Their Own Inabilities In An Abortion Decision 18

III. THE STATE HAS A COMPELLING INTEREST IN PROMOTING AND EFFECTUATING ADULT GUIDANCE FOR MINORS IN THEIR ABORTION DECISIONS 21

A. Parental Involvement In The Abortion Decision Alleviates Psychological Stress And Aftershock And Helps To Prevent Multiple Abortions 21

B. Parental Involvement In The Abortion Decision Can Prevent Serious Injury Or Illness To Minors Seeking Abortions 25

CONCLUSION 29-30

TABLE OF AUTHORITIES

CASES — Page

Akron v. *Akron Center for Reproductive Health Inc.*, 462 U.S. 416 (1983) 18, 21

Bellotti v. *Baird*, 443 U.S. 622 (1979) 15, 16, 19, 24

Bluebird Baking Co. v. *McCarthy*, 3 O.O. 490; 36 N.E.2d 801 (1935) 9

Boltz v. *Boltz*, 31 Ohio App.3d 214, 509 N.E.2d 1274 (Ohio 1986) 9

Carey v. *Population Services International*, 431 U.S. 678 (1977) 4

Ginsberg v. *New York*, 390 U.S. 629 (1968) 4, 17

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 8

Guardianship of Smith, 42 Cal.2d 91, 265 P.2d 888 (1954) 12

H.L. v. *Matheson*, 450 U.S. 398 (1981) ..... *passim*

In re Doe, 167 N.E 396 (Ohio Juv. 1960) 9

Loving v. *Virginia*, 388 U.S. 1 (1967) 5

Meyer v. *Nebraska*, 262 U.S. 390 (1923) 5, 6, 13

Moore v. *City of East Cleveland*, 431 U.S. 494 (1977) 5, 7, 8, 14, 19

Parnham v. *J.R.*, 442 U.S. 584 (1979) 13, 15, 18

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 6, 13

Planned Parenthood Association v. *Ashcroft*, 462 U.S, 476 (1983) 20

Planned Parenthood of Missouri v. *Danforth*, 428 U.S. 52 (1976) ..... *passim*

Prince v. *Massachusetts*, 321 U.S. 158 (1944) 4, 18

Quillion v. *Wallcott*, 434 U.S 246 (1978) 4

St. Claire Center Inc. v. *Mueller*, 34 Ohio App.3d 69, 517 N.E.2d 236 (1986) 9

Santosky v. *Kramer*, 455 U.S. 743. (1982) 9, 10

Sheldon v. *Sheldon*, 47 Wash.2d 699, P.2d 335 (1955) ... 8

Synder v. *Massachusetts*, 291 U.S. 97 (1934) 8

Spink v. *Spink*, 78 Ohio St. 390, 85 N.E. 1131 (1905) ... 9

Stanley v. *Illinois*, 405 U.S. 645 (1972) 7

State v. *Albert*, 8 Ohio Misc.2d 13, 456 N.E2d 594 (1983) 9

State v. *Meyer*, 14 Ohio App.3d 69, 470 N.E.2d 156 (Ohio 1983) 9

Thornburgh v. *American College of Obstetrics & Gynecology*, 476 U.S. 747 (1986) 21

Table of Authorities Continued

Page

Webster v. *Reproductive Services, Inc.*, 57 U.S.L.W. 5023 (U.S. July 3, 1989) 16, 27

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 4

Zbaraz v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd mem.*, 108 S.Ct. 479 (1987) 18, 21

STATUTES

Ohio Revised Code § 2317.54(c) 11

R.C. § 2919.21(A)(3) 9

R.C. §§ 2919.22(B)(2), 3319.41 9

LEGAL TREATISES

61 Am.Jur.2d Physicians § 178 (1981) 11

54 A.L.R.3d 990-91 (1973) 9

67 A.L.R.4th 517 (1981) 11

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Table of Authorities Continued

Page

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Table of Authorities Continued

	Page
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Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 429-30 (1974)	6
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INTEREST OF AMICUS CURIAE*

Concerned Women for America ("CWA") is a national, non-profit organization representing approximately 600,000 people. CWA's purpose is as follows:

> The purpose of CWA is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values.

One of the foremost concerns and desires of CWA is to protect the lives of the unborn. CWA supports the position of the appellant State of Ohio that parental notification and consent with judicial bypass prior to a minor obtaining an abortion is constitutional. Concerned Women for America urges this Court to overturn the decision by the United States Court of Appeals for the Sixth Circuit holding Ohio Substitute House Bill 319 unconstitutional.

ARGUMENT

INTRODUCTION

Parents have a constitutional right to oversee their daughter's abortion decision, regardless of whether a state parental notification statute exists. *Ohio* v. *Akron Center for Reproductive Health* is not just a case concerning a statutory right of parents pitted against their daughter's rights; this is a case attempting to block parents from taking part in a surgical decision with potentially far reaching physical and emotional consequences for their daughter and other family members.

Substantive and procedural due process rights under the Fourteenth Amendment are necessary to protect the valuable interests of the family, especially between par-

*This brief is submitted with the written consent of both parties, filed with the Clerk of this Court.

ents and their children. At the heart of that protection is familial bonds and relationships.

The constitutional interest of the family in preserving itself is multiplied in parent-child relationships. This Court has historically recognized that parents' interest in raising their children extend not only to their physical and emotional well-being, but their educational, religious and moral upbringing as well. Each aspect is implicated by a minor child's abortion or other significant medical procedure.

Parents are generally in a better position than their children to assess the impact of portentous decisions, as recognized both by common law and by statute. This includes decisions that involve medical procedures or surgery. However, the Supreme Court has thus far drawn an arbitrary line which differentiates abortion from all other surgical procedures, that require parental notification and consent. The Court's decision was perhaps made based upon the fallacious premises, now refuted through many medical studies, that abortion is an inherently "safe" procedure.

An abortion operation either involves strong chemicals, powerful vacuum machines, or cutting and scraping devices; any can cause internal organ damage, hemorrhaging, serious diseases, sterility, and even death. Drawing a distinction between an abortion operation and any other serious surgical procedure is based upon ideology rather than extensive medical data.

Parents and other family members are the ones who must bear the burden of caring for a young girl who has had a hysterectomy or other physical injury or emotional trauma as a result of abortion complications, not ideologues debating the merits of the independence of youth. Therefore, parents should retain the same rights to notification and consent they would retain in any other serious

surgical procedure. Minors have no greater constitutional interest in abortions than in other medical procedures with potential long-term effects. Therefore, minors should not be allowed different and greater access to abortions without consent than to other comparable medical procedures without consent. The constitutional rights of parents should stand paramount to those of abortion counselors who entice the child with an "easy solution" to her dilemma and with inadequate disclosure of health hazards.

Substantive and procedural due process rights exist for families in a host of other legal arenas, and may be invoked prior to any deprivation of rights that may affect the family. Similarly, due process rights should be affirmed for parents prior to a minor daughter's decision that may negatively affect upon the family for years to come. If a right to abortion can be created from a "penumbra," a concomitant constitutional right should be recognized to protect the integrity of the family by parental notification and consent, whether or not state laws address the matter.

Amicus Curiae Concerned Women for America respectfully urges this Court not only to hold Ohio's parental notification and consent law to be constitutional, but to find that independent of such a statute, a Fourteenth Amendment due process right exists for the protection of the family by parental notification and consent.

I. THE FAMILY ENJOYS MANY CONSTITUTIONAL RIGHTS WHICH ARE PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. THE FAMILY HAS PRIVACY RIGHTS THAT ARE PROTECTED BY THE CONSTITUTION, AND THOSE RIGHTS EXTEND TO AND PREDOMINATE OVER AN UNEMANCIPATED MINOR'S PRIVACY RIGHT TO AN ABORTION.

The American family enjoys inherent constitutional rights. Before those important rights may be impaired

the family is entitled to substantive and procedural due process of law under the Fourteenth Amendment. Parental guidance is important for the health, safety, and welfare of the family in general, and for children in particular.

This Court stated in *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968), that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." This foundational premise was echoed in *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972):

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

Besides its historical importance, the familial relationship enjoys substantial constitutional protection as well. In *Quillion* v. *Walcott*, 434 U.S. 246, 255 (1978) (quoting *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944), the court expanded on this theme:

> We have recognized on numerous occasions that the relationship between the parent and child is constitutionally protected . . . . 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' (Citations omitted.)

The child's interest in privacy that was found under the Due Process Clause in *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52 (1976), and *Carey* v. *Population Services International*, 431 U.S. 678 (1977), was an interest in having certain decisions made consistent with the child's best interests. But a young girl's right to privacy is inextricably bound wit.. and subject to the family of which

she is a part and the parents whose duty and right it is to rear her. Privacy interests in abortion do not outweigh a parent's concern and guidance for his or her minor child.

A different aspect of privacy is the "private realm of family life which the state cannot enter." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 499 (1977); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967). This is the "privacy" which affords a child the comfort, understanding, and most importantly, the protection of the family. This "private realm of the family" can be abruptly ripped open by an disclosed or uncounselled abortion. It is the family which must "privately" deal with the problem, not the abortion counselor who initially withheld information about the abortion from the parents to protect the "privacy' of the young girl. The same is true of any other significant medical procedure on a minor, which is why minors and counselors otherwise do not have rights that supersede parental notification and consent.

B. THE FAMILY, AND IN PARTICULAR A PARENT, HAS BEEN FOUND TO HAVE DUE PROCESS RIGHTS AND OTHER PRIVACY RIGHTS IN RELATION TO IMPORTANT DECISIONS WHICH MAY AFFECT THE FAMILY.

(1.) Due Process and Other Rights Exist for Parents in the Educational Upbringing of Their Children.

One line of cases which has found due process protection for the family, while focusing on parental rights, struck down state attempts to override parental educational choices. In *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), the court established that the liberty protected by the Fourteenth Amendment due process clause included "the right of the individual to . . . establish a home and bring up children . . . and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925), was even more explicit regarding the parents' rights, in striking down an Oregon law making it is misdemeanor for parents to send children between the ages of 8 and 16 to private schools. This Court found a *due process right* for parents to bring up children as they saw fit, free from unreasonable state interference:

> [W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 534-35. Noteworthy in the *Meyer* and *Pierce* decisions was the Court's recognition of a due process right for the parents to assert claims on the child's behalf although no independent interest of their own was at stake.[1] In the case at bar, the parents *do* have an independent interest of their own at stake, because of the possibility of consequential permanent physical or emotional injury, and the resulting emotional problems or long-term home care required for the child.

(2). Due Process and Other Rights Exist for Traditional Nuclear Families, Extended Families, and Even Custodial Families.

This Court has also found due process protection for the custodial family. General due process protections for the

[1] *See* Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423, 429-30 (1974) ("The Court appears never to have heard a case in which a litigant's only assertion of harm was that challenged action deprived third parties of their constitutional rights.")

family have been found while focusing exclusively on the right to custody in a broad sense. In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the Court held invalid an Illinois law under which the children of unwed fathers become wards of the state upon the death of the mother, because the father had a due process right to a hearing before being deprived of custody. The Court began with the assumption that the right at stake was "the interest of a parent in the companionship, care, custody, and management of his or her children . . . ." *Id.* at 651.

At least two separate parent-child interest's were recognized as deserving of Fourteenth Amendment due process protection. One is entitlement of biological parents and their children to each other, and the "familial bonds" that develop over time between parents, whether biological or not, and the children in their long term care. *Id.* at 651-52.

This recognition of important due process rights within the context of the family was reinforced by the Court in *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977). In that case a housing ordinance limiting occupancy of a dwelling unit to members of a single family (defining as "a family" only a few categories of related individuals, essentially parents and their children; that is, the nuclear family) was struck down. Mrs. Moore was a woman who was convicted of violating the ordinance because she lived with her son and two grandsons, and the grandsons were first cousins instead of brothers. The Court held in *Moore* that the right to live together as a family did not extend only to the nuclear family. Justice Powell, writing for the majority said:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with par-

> ents and children has roots equally venerable and equally deserving of *constitutional recognition*.

Justice Powell further noted:

> Our decisions establish that the *Constitution protects the sanctity of the family* precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our cherished values, moral and cultural.

431 U.S. at 503-504. In dissent, Justice White agreed that Moore's claim to family privacy represented "a liberty interest within the meaning of the Due Process Clause." *Id.*, at 547.

Implicit in these due process rights are the child's right to parental care and direction and the correlative parental right to care for and direct the child. The parental rights of custody and control are rights protected by the due process clause of the Fourteenth Amendment because they are "[s]o rooted in the traditions and conscience of our people as to be ranked fundamental."[2]

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[2] *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934), *quoted with approval in Griswold* v. *Connecticut*, 381 U.S. 479, 493 (Goldberg, J., concurring); *see Sheldon* v. *Sheldon*, 47 Wash. 2d 699, 703, 289 P.2d 335, 337 (1955) (custody rights of parents are "fundamental in our concept of a free society"). In *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977), the Court expressly sanctioned the reliance on "history and tradition" to give content to the fundamental rights protected by the Due Process Clause, *id.* at 503 n. 12, and found "the sanctity of the family" protected by this clause "precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *id.* at 503. In support of this quoted proposition, the Court cited a number of decisions protecting the traditional role of parents as decision makers in their children's lives. *Id.*, at 503 n. 12. The Court thus implied that these parental interests were similarly protected by substantive due process.

C. BOTH OHIO AND THE SUPREME COURT RECOGNIZE THE DECISIONS-MAKING FUNCTION OF PARENTS IN THE UPBRINGING OF THEIR CHILDREN AS INTEGRAL TO THE FAMILY RELATIONSHIP.

Parents enjoy near plenary rights when it comes to the custody and control of their children. Cases throughout the State of Ohio recognize a broad panoply of parental decision-making rights.[3]

These extensive rights have long been considered necessary adjuncts to and recompense for equally extensive parental duties of maintenance, support, and education. Indeed, parental rights are intimately connected to and conditioned upon the performance of these duties. Failure to adequately meet these responsibilities will generally involve the loss of parental rights, and may result in civil or criminal liability. *See e.g.*, 54 A.L.R.3d 990-91 (1973).

Many states terminate parental rights for neglect, cruelty, or the like.[4] In *Santosky* v. *Kramer* 455 U.S. 743 (1982), this Court held that states may not terminate parental rights based on the evidentiary standard of a

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[3] For example, the right to direct the child's educational and religious training, *In re Doe*, 167 N.E. 396 (Ohio Juv. 1960); the right to discipline the child in any reasonable manner, R.C. §§ 2919.22(B)(2), 3319.41; *State* v. *Albert*, 8 Ohio Misc.2d 13, 456 N.E.2d 594, (1983); the right to the child's earnings and services, *Bluebird Baking Co.* v. *McCarthy*, 3 O.O. 490, 36 N.E.2d 801 (1935); and often the right to support in indigence or old age, R.C. § 2919.21(A)(3); *St. Claire Center Inc.* v. *Mueller*, 34 Ohio App.3d 69, 517 N.E.2d 236 (1986); *Spink* v. *Spink*, 78 Ohio St. 390, 85 N.E. 1131 (1905).

[4] The obligation to support one's own children is both mandatory and a duty owed to the public at-large in Ohio. *Boltz* v. *Boltz*, 31 Ohio App.3d 214, 509 N.E.2d 1274 (Ohio 1986). It is a misdemeanor in the State of Ohio for a parent to fail to provide adequate support to his or her legitimate or illegitimate children under age 18. *State* v. *Meyer*, 14 Ohio App.3d 69, 470 N.E.2d 156 (Ohio 1983).

preponderance of the evidence, but must support its allegations by at least "clear and convincing evidence." *Id.* at 769. That high standard was demanded by the constitutional protection of parental rights. The Court pointed to the grave threat of erroneous termination, noting that "few forms of state action are both so severe and so irreversible." *Id.* at 759-60.

Thus termination must be based on a substantial showing of unfitness, and the state at every phase must provide the parents with fundamentally fair procedures:

> The fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Id. at 754-755. As high a standard should apply to a minor daughter's abortion decision; parents should be afforded fundamentally fair procedures to ensure that the State does not destroy familial bonds.

II. THE COURT HAS RECOGNIZED THAT CONSTITUTIONAL DUE PROCESS RIGHTS EXIST FOR PARENTAL NOTIFICATION AND CONSENT OR JUDICIAL BYPASS BEFORE MINOR FAMILY MEMBERS HAVE ABORTIONS OR OTHER MEDICAL PROCEDURES.

A. THE COURT HAS ACKNOWLEDGED THAT PARENTAL DUE PROCESS RIGHTS MAY BE EXERCISED IN TANDEM WITH STATE CONCERNS FOR MINORS IN MEDICAL DECISIONS, EVEN WHEN THE MINORS OPPOSE THE PARENTAL DECISIONS.

The issue before the Court is not only what rights to privacy the minor may enjoy in the abortion decision, but what inherent due process rights the parents, guardians, and other family members may enjoy as well with respect to that decision. That most parents would be concerned about and be in the best position to know what course of conduct is in the best interests of their child seems self evident.

That is why virtually every state has informed consent laws which require parental permission prior to surgical procedures, other than abortion, being performed on a minor.[5] Similarly, under Ohio Revised Code § 2317.54(c), an infant is not competent to give informed consent to a surgical or medical procedure, nor is a minor child beyond infancy. A young girl's physical state (such as pregnancy) does not enhance her ability to make an informed and mature decision regarding any particular surgical procedure. Especially in relation to that surgical procedure

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[5] "As a general proposition, except in the event of an emergency, a surgeon will be liable for an assault where he operates on a child with out the consent of the latter's parents." 61 Am.Jur.2d *Physicians* § 178 (1981). "When the patient is a minor, the patient is legally below the "age of consent," and the general rule is that a medical practitioner will be liable for treating a minor without the consent of the minor's parents." 67 A.L.R.4th 517 (1981).

known as "abortion," which is fraught not only with potential physical and emotional hazards, but with moral implications as well. Indications that a girl would be able to make a mature and informed decision in such a situation would be to the contrary.

The argument that a young girl's reproductive decisions are separate from other surgical operations does not stand up to logical scrutiny when carefully examined. The terminus of this logic is that "reproductive rights" extend to a daughter's decision to have a hysterectomy or be sterilized should she so desire, or conversly, to a young boy's decision to be castrated. Clearly, these are "reproductive decisions" that none would argue are constitutionally protected as to forbid parental notification or consent. But a decision to have an abortion can and often does result in permanent harm, psychological and physical, even sterility. The desire to protect the ability to destroy the fetus should not outweigh the parents' desire to protect their children.

The presumed "harmony-of-interests" between parent and child may well explain, in part the traditional, noninterventionist stance of most states regarding family matters. *See e.g., Guardianship of Smith*, 42 Cal.2d 91, 95, 265 P.2d 888, 891 (1954). Both statutory law governing family relationships and the opinions of the Court, however, continue to reflect the more historic, deep-seated cultural assumption that parental rights of custody and control are inherent, fundamental rights, rather than essentially derivative in nature according to their utility in promoting the best interests of the child[6]

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[6] Strauss & Strauss, Book Review, 74 Colum. L. Rev. 996, 1001 (1974) (reviewing Goldstein, Freud and Solint, *Beyond the Best Interests of the Child* (1973)) ("government is more effectively limited by recognizing that the parent's claim is not a mere derivation of what the interests of the child require . . .").

In *Parnham* v. *J.R.*, 442 U.S. 584 (1974), the Court reaffirmed the constitutionality of state *cooperation* with parents' efforts to promote the welfare of their children. In this case, Georgia's streamlined statutory procedures for parental commitment for children to state mental hospitals were upheld as constitutional largely on the basis that the obligations of parenthood include recognizing symptoms of illness and seeking and following medical advice. *Parnham*, 442 U.S. at 600. The decision was significant in that, unlike prior decisions vindicating parental rights, the class of children represented in this case clearly opposed parental commitment decisions facilitated by Georgia's procedures. The Court found this factor immaterial to the outcome of the case:

> We cannot assume that the result in *Meyer* v. *Nebraska* . . . and *Pierce* v. *Society of Sisters* . . . would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church school. The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child.

442 U.S. at 603-604. Considering the nature of the benefits discussed above, i.e., protection of the children from state exploitation, standardization and preparation of the child for the obligations of adulthood, it would seem particularly crucial to recognize the independence of parental rights and to encourage state *support* for parental authority in the context of a *conflict* between parent and child.

First, if the parents rights are merely derivative from what the best interests of the child requires, the state will need little more justification than its own opinion about those interests to intervene on behalf of the child in the

case of conflict.[7] Second, because the adolescent often tends to choose what is acceptable in the eyes of his peers,[8] state intervention that "saves" the child from parental opposition in the pursuit of his own desires may promote not the autonomy of self-governing adulthood but conformity to prevailing social standards and manipulation by the peer group. Finally, to the extent that the state rescues the child from parental decisions it finds repugnant, it impeaches the parent's own judgment and authority.

Planned Parenthood of Missouri v. *Danforth*, 428 U.S. 52 (1976), and *Bellotti* v. *Baird*, 443 U.S. 622 (1979), each recognized that not all minors are capable of giving informed consent to an abortion, thus implying that some form of independent review of the minor's decision is necessary to protect her from her own inabilities. As the Court in *Bellotti* said,

> The court long has recognized that the status of minors under law is unique in many respects . . . The unique role in our society of the family, the institution by which "we inculcate and pass down many of our most cherished values, moral and cultural," *Moore* v. *East Cleveland*, 431 U.S. 494,, 503-504, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531 (1977) (plurality opinion), requires that constitutional principles be applied with sensitivity and flexiblity to the special needs of

[7] *See* note 3 *supra*.

[8] L. Cole & I.N. Hall, *Psychology of Adolescence* 347 (7th ed. 1970):

> [O]ne of the deepest adolescent needs is the need to be supported and approved by his peers. Deviations of any sort from the mode of the group are painful. An adolescent cannot afford to risk the ridicule of his intimate friends because he is too dependent upon them for approval. The peer group is a powerful force in setting standards of behavior and attitudes toward various problems . . . . while [the peer group] endures, it is the most formative influence in the life of the average boy or girl.

> parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

443 U.S. at 635

The Court in *Danforth*, *Bellotti*, and *H.L.* v.*Matheson*, 450 U.S. 398 (1981), found preemption of certain parental rights necessary in the abortion context because parental notification would, in some cases, result in parental obstruction of the child's right to seek legal relief. This may be a legitimate concern, but the logical end-result of this idea is to deprive *all* parents of *any* right to notice or consultation because of possible abuse by some parents of their children's legal rights. This Court recognized the hazards of this ultimate kind of remedy in *Parnham* v. *J.R.* stating: "The statist notion that governmental power should supercede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." 422 U.S. at 602. The problem, if it exists at all, could more fairly be solved by either direct legal sanction or procedures that would protect the minor's rights while informing the parents as well.

This Court has repeatedly recognized the interest parents necessarily retain in their relationship with their children as being constitutionally protected. In upholding statutes which give parents the opportunity to be informed of such an important and serious surgical decision as an abortion, the Court recognizes that such a process is not only constitutionally permissible but may be mandated under the Due Process Clause. As Justice Powell stated in his concurrence in *Matheson*, *supra*,

> The State, aside from the interest it has in encouraging childbirth rather than abortion has an interest in

> fostering such consultation as will assist the minor in making her decision as wisely as possible. The State also may have an interest in the family itself, the institution through which "we inculcate our most cherished values, moral and cultural." Parents have a traditional and substantial intrest in, as well as responsibility for, the rearing and welfare of their children, especially during immature years.

A positive parent-child relationship may be crucial to the future welfare of a minor who is seeking an abortion. A state policy that permits a minor to obtain a surreptitious abortion without *any* procedural due process runs a risk similar to that in *Parnham*, of exacerbating existing tensions in the critical parent-child relationship and further jeopardizing the ability of parents to reach their estranged child[9]. A more appropriate and constitutionally permissive procedure would be designed to aid parents in discharging their responsibility to preserve and encourage the parent-child relationship, rather than foreclose any possibility of their involvement in the decision.[10]

However, no formal recognition of an innate procedure arising under the Fourteenth Amendment exists at this time. Because the constitutional right to an abortion was not struck down by this Court in *Webster* v. *Reproductive Services, Inc.*, 57 U.S.L.W. 5023 (U.S. Jul. 1989), the right of a child to obtain an abortion without parental

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[9] *See, e.g.*, C. Chilman, *Adolescent Sexuality In A Changing American Society* 302 ("a secret abortion . . . would seem to create a psychological burden for a young woman and a barrier to her future relationships with those people in her life that are significant to her.")

[10] The Court in *Bellotti* did make clear that under its proposal the reviewing court may properly take into account: (1) the state interest in encouraging familial, rather than judicial, resolution of a minor's abortion decision; and (2) the interest of the parents in the welfare of the child when determining whether a surreptitious abortion is in fact in a minor's best interest.

consultation still exists in many states. As long as such a right is mandated by the Court, a concomitant due process right arising under the Fourteenth Amendment should be recognized to exist for the protection of the family. To hold otherwise condemns thousands of children to unnecessary psychological or physical injury or even death (while states laboriously enact statutory guidelines for parental notification and consent) because of the foolishness of their decision.

B. THE STATE MAY IMPOSE PARENTAL OR JUDICIAL CONSENT REQUIREMENTS ON MINOR'S ABORTION DECISIONS EVEN IF SUCH REQUIREMENTS WOULD NOT BE APPLICABLE TO ADULTS IN THEIR ABORTION DECISIONS.

State imposed limitations on minors even extend to constitutional freedoms generally afforded adults. In *Prince*, the Court held that "the interests of society to protect for growth into free and independent well-developed men and citizens," permitted the State to enforce its statute which "[c]oncededly . . . would be invalid," if made applicable to adults. 321 U.S. at 165 & 167. As Justice Stewart noted in *Ginsberg*:

> [A]t least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be intolerable for adults.

This Court has recognized that the Constitution necessitates the regulation by the state on certain activities of minors. As the Court has stated in this regard, "The Court indeed, however, long has recognized that the State

has somewhat broader authority to regulate the activities of children than of adults." *Danforth*, 428 U.S. at 75.

For example, in *Prince* v. *Massachusetts*, the Court rejected a nine-year-old's claim to practice freely her religious convictions by distributing religious literature on the streets. The Court asserted that, "the mere fact that a state could not wholly prohibit this form of activity . . . does not mean it cannot do so for children . . . . The state's authority over children's activities is broader than over like actions of adults."428 U.S. at 168.

The state clearly has significant interest in promoting parental consultation with a minor before her decision to have an abortion. *Zbaraz* v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd mem.*, 108 S.Ct. 479 (1987). A state's interest in protecting immature minors is sufficient to require parental consent, but "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interest." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 440 (1983).

C. BECAUSE OF THE VULNERABILITY OF CHILDREN, PROCEDURAL DUE PROCESS IS NEEDED TO PROTECT THEM FOR THEIR OWN INABILITIES IN AN ABORTION DECISION.

Parental interests in children extends to their health and well being. Thus, the parent's right to supervise the upbringing and education of their children includes the "high duty' of parents "to seek and follow medical advice" and in so doing, will "act according to the best intersts of their children." *Parnham*, 442 U.S. at 602. Therefore, parents have an important interst in supplying essential medical and other information to a physician. This is particularly true with regard to a young girl's abortion

since its consequences can be "serious and . . . lasting," and are "markedly more severe in girls under 18 than adults." *Matheson*, 450 U.S. at 411 n.20.

The recognition by this Court of the necessity of parental input in their minor daughter's abortion decision has been the basis for the Court's recognition of constitutional due process rights for the family as well. *Planned Parenthood of Missouri* v. *Danforth*, and *Bellotti* v. *Baird*, 443 U.S. 622 (1979). Each recognized that not all minors are capable of giving informed consent to an abortion, thus implying that some form of independent review of the minor's abortion decision was necessary to protect her from her own inabilities. A plurality of justices articulated in *Bellotti* the compelling reasons that the court has found to justify parental consent and notification:

> The Court long has recognized that the status of minors under the law is unique in many respects . . . . The unique role in our society of the family, the institution by which 'we inculcate and pass down most of our most cherished values, moral and cultural,' *Moore* v. *East Cleveland*, 431 U.S. 494, 503-504, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531 (1977) (plurality opinion) requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Bellotti, 443 U.S. at 635. The Court also observed:

> [P]arental notice and consent are qualifications that typically may be imposed by the state on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may deter-

> mine that parental consultation often is desirable and in the interest of a minor. It may further determine, as a general proposition, that such consultation is paticularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns.

Id. at 640. Quoting from Justice Stewart's concurrence in *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 91 (1976), this Court noted:

> There can be little doubt that the State furthers a constitutionally permissable end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.

Id at 641.

The notion that parents have absolutely no due process rights in their daughter's abortion decision in relation to notification, consent, or judicial bypass was firmly rejected in *Planned Parenthood Association* v. *Ashcroft*, 462 U.S. 476 (1983). In upholding the due process rights of the family this Court in *Ashcroft* upheld a Missouri statute which called for the "informed written consent of one parent" or judicial bypass before a minor could be granted an abortion. *Ashcroft*, 462 U.S. at 480.

Therefore, for parents to fulfull their "substantial interest in, as well as responsibility for, the rearing and welfare of their children," they must be made a cohesive part of their daughter's abortion decision. That interest can best be preserved through procedural and substantive due process which would insure the parents' right to notification and consent prior to their daughter obtaining an abortion. Even if the Ohio statute did not exist, the parents' constitutional rights to oversee their daughter's abortion would remain.

III. THE STATE HAS A COMPELLING INTEREST IN PROMOTING AND EFFECTUATING ADULT GUIDANCE FOR MINORS IN THEIR ABORTION DECISIONS.

A. PARENTAL INVOLVEMENT IN THE ABORTION DECISION ALLEVIATES PSYCHOLOGICAL STRESS AND AFTERSHOCK AND HELPS TO PREVENT MULTIPLE ABORTIONS.

The state clearly has a significant interest in promoting parental consultation with a minor before her decision to have an abortion. *See e.g.*, *Zbaraz* v. *Hartigan*, *supra*. A majority of the Court has indicated that "a State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial." *Akron*, 462 U.S. at 439.

As Chief Justice Burger stated in dissent in *Thornburgh* v. *American College of Obstetrics & Gynecology*, 476 U.S. 747, 785 (1986),

> Parents, not judges or social workers, have the inherent right and responsibility to advise their children in matters of this sensitivity and consequence. Can one imagine a surgeon performing an amputation on a 14-year-old girl without consent of a parent or guardian except in an emergency situation? . . . Even if I were to agree that the Constitution requires that states may not provide that a minor receive parental consent before undergoing an abortion, I would certainly hold that judicial approval may be required. This is in keeping with the longstanding common-law principle that courts may function *in loco parentis* when parents are unavailable or neglectful, even though courts are not very satisfactory substitutes when the issue is whether a 12-, 14-, or 16-year-old unmarried girl should have an abortion.

A study conducted in 1980 concluded that "few family planning clinics have parent consent policies." Torres, Forrest, and Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Family Planning Perspectives 284, 285 (1980). Less than half of those abortion facilities require parental notice even for teenagers 15 years of age or younger; even fewer require parental notification before performing abortions on minors age 16 or older. *Id.* at 284. Nearly half (45%) of the 1,170 teenage abortion patients interviewed admitted that their parents did not know they were obtaining an abortion. *Id.* at 289. Ninety one percent of these teenagers were living with their parents, while four percent were living with relatives. *Id.* at 287; *see also* Rosen, Benson and Stack, *Help or Hinderance: Parental Impact on Pregnant Teenagers' Resolution Decisions*, 31 Family Relations 271, 279 (1982): R. Mnookin, *In the Interests of Children* 158 (1985).

The underlying rationale for having a more structured decision making process for minors considering abortions is that adolescents can be ashamed, frightened, alone, and sometimes the victims of their own destructive game playing with their parents. Gedan, "Abortion Counseling with Adolescents," in *Abortion: The Emotional Implications* 102 (R. Kalmar ed. 1977). Unlimited freedom adds to the adolescent's already-present feeling of insecurity. Gallagher, Heald and Garrell, *Medical Care of the Adolescent* 243 (3rd ed. 1976). Minors have a particular need for adult guidance in areas in which they have no childhood experience to guide them. E. Hurlock, *Adolescent Development* 252 (4th ed. 1973). To eliminate parental involvement from a pregnant minor's abortion decision is both unrealistic and unnatural.[11] As the Sex Information and

[11] This widely accepted view of the need for adult guidance by adolescents has been stated as follows:

> Adolescents lack the adult benefits of life experience in autonomy and problem solving . . . . Adolescents have had less experience at testing or trusting their intuitive feelings, and are often unable to reassure themselves in this way. Young women may rely on less analytical approaches to the problem, such as following the normative behavior of their peers or basing decisions on romantic, unrealistic scripts . . . . A well-thought-out-pregnancy decision can enhance an adolescent's development.

Brown, *Adolescents and Abortion: A Theoretical Framework for Decision Making*, 12 J. Obstetrics, Gynecology & Neonatal Nursing 241, 244-45 (1983).

Education Council of the United States has stated in this regard: "As an isolated approach, abortion does little to help the individual work out basic conflicts about herself and may add to feelings of guilt and depression." Sex Information and Education Council of the United States, *Teenage Pregnancy: Prevention and Treatment* (1971).

The occurrence of a pregnancy often indicates a psychological need to become pregnant which is greater than the need not to be pregnant, and unless a therapeutic approach addresses itself to an understanding of that need and an adjustment of basic life situations, the need will persist and abortion will accomplish little with respect to the well-being of the individual. Sarrel, *Teenage Pregnancy*, 16 Pediatrics Clinics N. Am. 121 (1969). Absent parental participation in the abortion decision, there is an enhanced risk of "replacement pregnancy" and multiple abortions for adolescents. Teitze, *Repeat Abortions Why More*, 10 Family Planning Perspectives 205, 286 (1978); Steinhoff, et al., *Women Who Obtain Repeat Abortions: A Study Based on Record Linkage*, 11 Family Planning Perspectives 30 (1979). Efforts to shield a pregnant minor from parental participation appear to be responsible, at least in part, for the tragic syndrome of multiple-abortions among teenagers. *Repeat Abortions, Why More* at 286.

The long-term emotional trauma caused by abortion can be severe. Researcher Judith Wallerstein, a proponent of legalized abortion, nevertheless concluded from her 1972 study that her findings "justif[ies] serious social concern over the psychological impact and long-range consequences for the young person of the readily available abortion procedure." Wallerstein, Kurtz and Bar-Din, *Psychological Sequelae of Therapeutic Abortion in Young Unmarried Women*, 27 Archives Gen. Psychiat. 828 (1972) (hereinafter "Abortion Study"). This study reported that nearly one-third of the young women who had abortions:

> Showed moderate to considerable decline in psychosocial functioning five to seven months postabortion as measured from the baseline of their reported, adequate pregnancy status. These young women, at initial follow-up, were suffering with a variety of specific symptoms of maladaptive behavior including mild to moderate depressive episodes, a variety of new physical complaints for which medical attention had not been sought . . . . difficulty in concentrating at school, withdrawal from precious social contacts, lowered self-esteem explicitly related to pregnancy and abortion experience, a newly begun promiscuous pattern in relationships with men, and regression to more infantile modes of relationships with parents. These difficulties did not predate the pregnancy.

Abortion Study at 830.[12] "Compared with adults, adolescents appear to have somewhat more negative responses on average to abortion." Adler and Dolcini, "Psychological Issues in Abortion for Adolescents," in *Adolescent Abortion: Psychological and Legal Issues* (G. Melton ed. 1986).

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[12] This finding was cited with approval in *H.L.* v. *Matheson*, 450 U.S. at 412 n.20.

Parental consultation, or at the very least some judicial determination as to minor's maturity (concerning her ability to understand the possible serious consequences of her abortion decision), is necessary to protect minors against their "peculiar vulnerability." *Bellotti*, 443 U.S. at 634. One reason for this is because teenagers more profoundly suffer anxiety, depression, sadness, guilt and regret over the abortion decision than do mature women. Cates, *Adolescent Abortions in the United States*, 1 J. of Adolescent Health Care 18 (1980). Such a process is also necessary to protect the family from the serious long term emotional consequences which may be suffered because of a child's abortion decision.

B. PARENTAL INVOLVEMENT IN THE ABORTION DECISION CAN PREVENT SERIOUS INJURY OR ILLNESS TO MINORS SEEKING ABORTIONS.

Serious injury due to an abortion is not an anomaly, but as in any serious surgical procedure, it is a very real potential in a significant number of adolescent abortions.[13] As noted above, most states (like Ohio) have strict requirements for parental notification and consent prior to a minor receiving other surgical treatment. That is because parental input is important to prevent exacerbation or aggrevation of a medical condition unknown to a treating physician. It is also important for a parent to be aware that medical treatment has been administered in case complications follow. It is therefore important to recognize implicit constitutional protection under the Fourteenth Amendment allowing parents the opportunity to be informed so that injury to the child may be avoided.

Researchers for the U.S. Centers for Disease Control concluded that minors under age 18 who had curettage

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[13] The physical health risks of abortions for minors have been recognized by this Court. *H.L.* v. *Matheson*, 450 U.S. at 412 n.20.

abortions performed were more susceptible to cervical injury than were older women: "These findings cause concern because cervical injury in initial unplanned pregnancies may predispose young women to adverse outcomes in future planned pregnancies." Cates, et al., *The Risks Associated With Teenage Abortion*, 309 New Eng. J. Med. 621, 624 (1983). One study observed a tenfold increase in midtrimester spontaneous abortion after one or more induced abortions and drew attention to the possibility of cervical imcompetence as a result of abortion-associated cervical trauma. Wright, Campbell and Beazley, *Second-Trimester Abortion After Vaginal Termination of Pregnancy* 1 Lancet 1278-1279 (1972). Women (and children) who have had two or more induced abortions have been found to be two to three times more at risk for first-trimester spontaneous abortions. A. Aschengrau Levin, et al., *Association of Induced Abortion With Subsequent Pregnancy Loss*, 243 J. A.M.A. 2495 (1980). Another study found a second trimester spontaneous fetal loss increase of up to 120% as a result of previously induced abortions. Harlap, Shiono, Berendes and Pellegrin, *A Prospective Study of Spontaneous Losses After Induced Abortions*, 301 New England J. of Med. 677 (1979). It is doubtful that a young girl will be counseled about her possible sterility as a result of an abortion by those that work at an abortion facility.

At least one study has concluded that pelvic inflammatory disease, an inflammation of the female genital tract which can cause permanent sterility or chronic ill-health, occurs as much as twenty percent of the time as the result of induced abortion. Heisterberg et al., *Prophylaxis With Lymecycline in Induced First-Trimester Abortion: A Clinical, Controlled Trial Assessing the Role of Chlamydia Trachomatis and Mycoplasma Hominis*, 12 Sexually Transmitted Diseases 72-75 (1985). Other genital tract infections such as endometritis are also fairly

commonplace after abortions. Burkman, Atienza and King, *Culture and Treatment Results in Endometritis Following Abortion*, 128 Am. J. Obstet. Gynecol. 556 (1977).

Internal hemorhaging may occur in patients as the result of a saline-induced abortion. H. Glueck, et al., *Hypertonic Saline-Induced Abortion: Correlation of Fetal Death With Disseminated Intraveascular Coagulation*, 225 J. AMA 28 (1973); F. Beller, et al., *Consumptive Coagulopathy Associated With Intra-Amniotic Infusion of Hypertonic Salt*, 112 Am. J. Obstet. Gynecol. 534-543 (1972).

Use of the abortifacient prostaglandin has been noted to have a complication rate of 42.6%, and the "patient at risk is pregnant for the first time and almost always less than 21 years of age." Duenhoelter and Gant, *Complications Following Prostaglandin-Induced Midtrimester Abortion*, 46 Obstet. and Gynec. J. Am. Coll. Obstet. and Gynec. 247 (1975).

According to two independent studies, the immediate or short-term complication rate for vacuum abortions is approximately twelve percent. D. Reardon, *Aborted Women—Silent No More* 94 (1987). "The nine most common "major" complications resulting from vacuum abortions are: infection, excessive bleeding, embolism, ripping or perforation of the uterus, anesthesia complications, convulsions, hemorrhage, cervical injury. and endotoxic shock." *Id.* at 95.

The types of complications associated with dilation and curettage abortions are virtually the same as vacuum abortions, but are twenty percent more frequent. *Id.* at 96. In the United States saline abortion is second only to heart transplants as the elective surgery with the highest fatality rates. A. Saltenberger, *Every Woman Has a Right to Know the Dangers of Legal Abortion* 33 (New

Jersey 1982). Saline abortions are outlawed in Japan because they are "extraordinarily dangerous." T. Hilgers and D. Horan, *Abortion and Social Justice* 292 (New York 1972).[14]

One doctor described some of the abortion injury-related cases he had treated in various minors in the following manner:

> A 17-year-old girl, nine weeks pregnant, had a suction abortion at a local clinic. Fever, chills, and pelvic pain became progressively worse during ensuing days, and she was hospitalized when a pelvic mass failed to respond to caphalexin (Kefles) and ampicillin. Her condition deteriorated despite intensive IV antibiotic therapy, and laparotomy on the eighth day after abortion revealed a perforated uterus with massive pyosalpinx and pelvic abcesses, necessitating total hysterectomy and bilateral salpingo-oophorectomy. . . .
>
> In a 17-year-old girl severe hysteria developed four days after suction curettage abortion at a local clinic. Bleeding and cramping had been present daily since the abortion. When the pain became excrutiating she went into her bathroom and began passing recognizable fetal parts into the toilet bowl. She fainted and was brought into the office by a neighbor. She had been told at the abortion clinic that all there was to the pregnancy was a little tissue. She could not accept the realization that she had "destroyed a baby."
>
> A 17-year-old girl, supposedly eight weeks pregnant, suffered cervical lacerations and severe hemmorrhage after a clinic abortion. She was told she had "twins" and that her operation was therefore more

[14] For an in-depth overview of the potential physical harms caused by abortion *see*, Brief Amici Curiae of Focus on the Family and Family Research Council, in *Webster* v. *Reproductive Health Services* No.88-605 at 2a-16a (1988).

> complicated and traumatic. She suffered prolonged disability, remorse, and guilt, and regretted very much having had the procedure. In the four years since the abortion she has been unable to become pregnant.

M. Bulfin, *A New Problem in Adolescent Gynecology*, 72 South Med. J. 967 (1979).

Minors currently have all types of abortion available to them. Under-age children who are "counseled" by those working in abortion facilities are rarely, if ever, given sufficient information concerning the potential serious health risks which could be incurred as a result of an abortion. J. Burtchaell, *Rachel Weeping and Other Essays on Abortion* 41-44 (1982).

It is hardly imaginable what can weaken familial bonds more than a severe psychological disturbance or a permanently debilitating injury as the result of an abortion. The desire of Planned Parenthood and other organizations such as the American Civil Liberties Union is that parents *never* be informed or consulted about the abortion procedure their daughter undergoes. *See e.g.*, American Civil Liberties Union Reproductive Freedom Project, *Parental Notice Laws: Their Catastrophic Impact on Teenagers' Right to Abortion* (1986). However, it is the parents and other family members who are burdened with the potentially disasterous consequences of an abortion operation which went wrong for the rest of their lives. The consequences of serious injury may be avoided if parents are allowed to become an integral part of their daughter's abortion decision. Judicial recognition of this constitutional right of parents and children not only follows legislative (and therefore popular) intent, but it follows the Constitution as well.

Amicus urge this Court that it is time to recognize that many young girls suffer substantial harm as a result of an

abortion, and that harm could be averted or at least alleviated if parental notification or consent were required. If the right to an abortion is constitutionally mandated, then a co-existent constitutional right to protect the children and the family must also exist.

CONCLUSION

The Decision of the Sixth Circuit should be overturned to uphold the rights of the family, and to prevent harm to immature and unemancipated minors. This Court should declare a constitutional right of parents to oversee their daughter's abortion decisions, regardless of whether a state parental notification law exists or not. Because an Ohio statute recognizes the already existing constitutional rights of parents, it should be upheld.

Dated: August 28, 1989

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Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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JANE HODGSON, *et al.*,

Petitioners,

v.

STATE OF MINNESOTA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE STATES OF OHIO AND MINNESOTA

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. SIMPLIFYING THE INTRICATE RULES IN THIS COURT'S ABORTION JURISPRUDENCE EFFECTIVELY MEANS RECONSIDERATION OF *ROE v. WADE*	6
A. The Abortion Decisions Reflect Increasingly Complex Legislative Activity by the Court	7
B. Judicial Review of State Health and Welfare Laws Should Exhibit Deference to the Legislative Process	11
II. A STATE MAY PERMISSIBLY REQUIRE NOTICE TO PARENTS OF THEIR DAUGHTER'S INTENTION TO SEEK AN ABORTION AND A REASONABLE CHANCE TO CONFER WITH HER	14
A. Protection of Family Integrity Is An Important Public Welfare Interest that Merits Legislative Protection	15
B. The Court Should Reject Efforts to Redraft State Statutes That Promote the States' and the Family's Interests in Family Integrity	19
CONCLUSION	26

TABLE OF AUTHORITIES

Cases: Page

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 7, 10, 14, 19
Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988), *juris. noted*, 109 S.Ct. 3239 (1989) (No. 88-805) 6, 9, 10, 18
Application of President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964) 16
Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87 (1983) 12
Bellotti v. Baird (I), 428 U.S. 132 (1976) 9
Bellotti v. Baird (II), 443 U.S. 622 (1979) ..... *passim*
Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986) 7
Berger v. New York, 388 U.S. 41 (1967) 8
Berman v. Parker, 348 U.S. 26 (1954) 12
Butler v. Pennsylvania, 51 U.S. (10 How.) 402 (1850) 11
Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977) 15
Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 11, 25
Ginsburg v. New York, 390 U.S. 629 (1968) 16, 18, 21
Glick v. McKay, 616 F. Supp. 322 (D. Nev. 1985) 10
Goss v. Lopez, 419 U.S. 565 (1975) 17
Harris v. McRae, 448 U.S. 297 (1980) 2
Hartigan v. Zbaraz, 484 U.S. 171 (1987) (evenly divided court), *aff'g*, 763 F.2d 1532 (7th Cir. 1985) 9
H. L. v. Matheson, 450 U.S. 398 (1981) ..... *passim*
Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988) (en banc), *cert. granted*, 109 S.Ct. 3240 (1989) (Nos. 88-1125, 88-1309) 6, 10, 18
Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986) 20
In Re Gault, 387 U.S. 1 (1967) 17
Kleppe v. New Mexico, 426 U.S. 529 (1976) 21
Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870) 5, 13, 25
Lehr v. Robertson, 463 U.S. 248 (1983) 4, 15, 18

TABLE OF AUTHORITIES—Continued

Page

Maher v. Roe, 432 U.S. 464 (1977) 19
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 12
McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 17
Meyer v. Nebraska, 262 U.S. 390 (1923) 15, 16
Michael H. v. Gerald D., 109 S.Ct. 2333 (1989) 17
Moore v. City of East Cleveland, 431 U.S. 494 (1977) 4, 15
New Jersey v. T.L.O., 469 U.S. 325 (1985) 16
Otis v. Parker, 187 U.S. 606 (1903) 5, 12, 25
Parham v. J.R., 442 U.S. 584 (1979) 17, 23
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 15, 16
Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) ..... *passim*
Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976) ..... *passim*
Prince v. Massachusetts, 321 U.S. 158 (1944) 14, 15, 16, 18
Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 12
Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*
Santosky v. Kramer, 455 U.S. 745 (1982) 5, 17
Smith v. Organization of Foster Families, 431 U.S. 816 (1977) 19
Stanford v. Kentucky, 109 S.Ct. 2969 (1989) 12
Thompson v. Oklahoma, 108 S.Ct. 2687 (1988) 12, 22
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) ..... *passim*
Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969) 16
Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989) ..... *passim*
Wisconsin v. Yoder, 406 U.S. 205 (1972) 14, 15, 16, 17, 23

Statutory Provisions:

Omnibus Crime Control Act, Title III, 18 U.S.C. §§ 2510, *et seq.* 8

TABLE OF AUTHORITIES—Continued

Miscellaneous:	Page
Bernardin, "The Role of the Religious Leader in the Development of Public Policy," 34 *De Paul L. Rev.* (1984) (Address to ABA)	2
W. Blackstone, *Commentaries on the Laws of England* (1765)	15
Brief *Amicus Curiae* of U.S. Catholic Conference in *Webster v. Reproductive Health Services*, No. 88-605	7
B. Cardozo, *The Nature of the Judicial Process* (1921)	12
Hafen, "Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to their 'Rights,'" 1976 *B.Y.U. L. Rev.* 604	15, 17
S. Jordan, *Decision Making for Incompetent Persons* (1985)	13
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G. Melton (ed.), *Adolescent Abortion: Psychological and Legal Issues* (1986)	24
J. Noonan, *A Private Choice: Abortion in America in the Seventies* (1979)	13
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 88-805, 88-1125, 88-1309

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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JANE HODGSON, *et al.*,

Petitioners,

v.

STATE OF MINNESOTA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE STATES OF OHIO AND MINNESOTA

INTEREST OF *AMICUS*

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic

Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops in such areas as education, family life, health and hospitals, social welfare, immigrant aid, poverty assistance, civic education, youth activities, and communications. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States. Values of particular importance to the Church are the protection of family life and the protection of unborn life.[1] Both are implicated in the cases at bar.

Both Ohio and Minnesota request this Court to clarify the scope of a State's authority to legislate in the area of abortion when it concerns the rights and responsibilities of parents regarding their children. Because both States seek more definitive and detailed judicial direction of the content of their laws, this *amicus* is concerned that the Court will be tempted to grant those requests. Less not more specificity about the intricacies and facets of legislation is required from this Court. Unless plainly unconstitutional, a legislature's balance of the various rights, interests, and obligations in abortion, as in other areas of the law, should receive judicial deference, not redrafting. These cases offer the Court an opportunity to restore what *Roe v. Wade* and subsequent cases have denied: legitimate legislative prerogatives to set public policy in matters deeply affecting the welfare of parents and children.

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[1] Although such values may have religious or denominational roots, they are shared by many, including those who profess no religion. The suggestion that legislation restricting abortion "establishes" religion is spurious. *Harris v. McRae*, 448 U.S. 297 (1980). The mere fact that religious organizations advocate particular legislative approaches does not establish "religion" but only "free expression," a right we do not surrender by either self-restraint or enforced silence. *Compare Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3085 (1989) (Stevens, J., dissenting) *with* Bernardin, "The Role of the Religious Leader in the Development of Public Policy," 34 *DePaul L. Rev.* 1 (1984) (Address to ABA).

These cases also present an opportunity for this Court to resist efforts to portray parental notice laws as creating conflicts between rights of parents and rights of children, and in the process, to strengthen family integrity. This Court has historically affirmed and strengthened family life in many areas, but has not done so meaningfully in the context of abortion. If a family is to retain any vitality when confronted by this reality, its members must, at a minimum, be entitled to reflect upon and discuss whether a pregnant dependent adolescent should consider termination of her pregnancy through abortion. To rule that a State may not shield the family for a brief time for this kind of consultation is to deny family integrity and ultimately to undermine familial relationships.

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

In its most recent Term, this Court upheld portions of a Missouri statute regulating abortion and establishing the State's policy regarding unborn life. *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989). A plurality recognized a conflict with existing decisions on abortion and expressed a willingness to narrow their scope or even overrule them if necessary. Certainly, as the plurality there recognized, the Court's jurisprudence has encouraged judicial involvement in the crafting of a "code of regulations rather than a body of constitutional doctrine." *Id.* at 3057. Its abortion decisions being essentially legislative, this Court until recently effectively reserved to the judiciary the task of writing the rules that would govern abortion regulation.

The States have continually expressed frustration over the constant and detailed involvement of the federal courts in the development of their statutory law. A particular area of concern has been the extent to which this Court has constitutionalized an adolescent's choice to have

an abortion, contrary to her parents' views or even without their knowledge. Starting with *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), this Court has ruled in one fashion or another on the permissible parameters of that choice some eight times. Still, the ultimate issue of who must settle the scope of parents' involvement in their child's decisions persists. As the courts continue to prescribe the intricate details of the law, the legislatures—the traditional forum in which such issues are resolved—are stripped of their legitimate policy-making functions. In the process, the family unit suffers.

Society owes much of its stability to the strength of the family and has a vital interest in preserving family integrity. "The intangible fibers that connect parents and child . . . are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility." *Lehr v. Robertson*, 463 U.S. 248, 256 (1983). Indeed, "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. 494, 503-504 (1977) (plurality).

Abortion challenges that institution and its values, as well as society itself, in fundamental ways. Under the abortion decisions of this Court, one member of a household may dictate to all the others whether new life—plainly a member of the family—may be allowed to be born. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. at 70-71, 74-75. When the person making that decision is an adolescent, the implications are especially serious. If she is to appreciate meaningfully the import and consequences of her actions, the adolescent needs guidance from knowledgeable and caring persons, not abortion clinic employees who lack intimate information about her life. *Id.* at 91 (Stewart, J., concurring).

The persons she may and should look to are her parents or those who legally stand in their place. *Bellotti v. Baird (II)*, 443 U.S. 622, 640 (1979) (plurality).

This Court has recognized the importance of parental consultation and consent when the person seeking an abortion is an adolescent. *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-91, 505 (1983); *H.L. v. Matheson*, 450 U.S. 398, 409-11 (1981). The process of intra-family discussion and decisionmaking is advanced by statutes requiring that an adolescent pause for a brief time, facilitating consultation with her parents. It is well settled that such a legislative judgment, which reflects a proper balance of State, family and individual interests, should not be lightly set aside, and then only when it is "clearly incompatible" with supervening constitutional mandate. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 530-31 (1870); *Otis v. Parker*, 187 U.S. 606, 608 (1903). The legitimacy of such a legislative judgment, presented in this case, cannot be seriously doubted. The normative principle that should guide this Court is its teaching that parents, even in families under stress, have a "vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). That vital interest is properly advanced by the statutes under review here, and should be affirmed by this Court.

But more is needed. The underlying problem presented by these cases is the narrow role some would accord the legislature in the regulation of abortion. Opponents of parental notice demand that the trial courts entertain their opinion evidence that such laws are impractical and unwise, and for this reason, unconstitutional. Whatever merit these opinions might have, they are misdirected. Such argumentation, with corresponding rebuttal, would ordinarily be presented to the legislatures, not the courts, for debate and resolution. The increasingly intricate jurisprudence of this Court encourages, unfortunately, a

contrary result. A thorough reevaluation of *Roe v. Wade*, 410 U.S. 113 (1973), and the sixteen years of subsequent decisions, would lead to, at least, one singular result—restoration of the legislative function to the State legislatures. That kind of reconsideration should begin with these cases, where such issues are legitimately presented.

ARGUMENT

I

SIMPLIFYING THE INTRICATE RULES IN THIS COURT'S ABORTION JURISPRUDENCE EFFECTIVELY MEANS RECONSIDERATION OF *ROE v. WADE*.

Both Ohio and Minnesota sought review from this Court to clarify certain questions of statutory detail on the general issue of parental notice in instances of adolescent abortion. *E.g.*, Jurisdictional Statement of Ohio at 18-19; Cross-Petition for Writ of Certiorari of Minnesota at 16-17. Both lower courts endorsed the principle of parental involvement in the lives of their children. *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852, 857-58 (6th Cir. 1988); *Hodgson v. Minnesota*, 853 F.2d 1452, 1455 (8th Cir. 1988) (*en banc*). However, both courts questioned specific aspects of the statutes and in fact found fault in one or another detail of the statutes. *Akron Center*, 854 F.2d at 861; *Hodgson*, 853 F.2d at 1457. Minnesota notes that, in any other context, the principle advanced by the statute would be nondebatable: that parents should know about important aspects of their children's lives and be involved in their significant, life-affecting decisions. Cross-Petition at 15. Ohio goes further, noting that this case is a "paradigm of the inability of State legislatures to enact laws that effectuate the States' interest in encouraging parental involvement in the decision of a minor." Jurisdictional Statement at 16. Both States call for more definitive direction about the details of their statutes

from this Court. In other words, they seek an outline of a permissible statute.

These cases illustrate problems inherent in this Court's abortion jurisprudence. The Court has taken onto itself a broad rule-writing function, and created a code that has become even more ponderous and difficult, not only for the legislatures to interpret and apply, but also for courts to review. Until this Court is willing to face the issues legitimately presented by these cases[2] and reconsider the jurisprudence begun in *Roe v. Wade*, these problems will persist.[3]

A. The Abortion Decisions Reflect Increasingly Complex Legislative Activity by the Court.

In 1973, the Court created a new constitutional right to obtain an abortion with an accompanying "legislative"

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[2] Neither state has yet expressly sought reconsideration of *Roe v. Wade*. *But see* Ohio Jurisdictional Statement at 16-17. There is sentiment on the Court for avoiding such reconsideration unless the issue is actually presented *and* a proper party demands it. *Compare Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting) (conflict but no demand) *with Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3060 (1989) (O'Connor, J., concurring) (demand but no conflict). In these cases, however, the scope and role of proper legislative activity is raised legitimately and should be resolved. *See id.* at 3058 (plurality). So too, the legislative balance given to competing interests, each of which this Court has called "fundamental" at one time or another, gives a legitimate basis on which to reconsider *Roe v. Wade*. *See* note 3, *infra*.

[3] Because the existence of a federal constitutional right to abortion is crucial to subject matter jurisdiction, the efficacy of *Roe v. Wade*, under which the federal question is presented, is always at issue in abortion cases, whether raised by a party or not. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 547 (1986). It is plain that unless the Court is willing to take action in an appropriate case, such as these, litigation will compound the Court's problems and the problems for those who must live or die with its decisions. Brief *Amicus Curiae* of U.S. Catholic Conference in *Webster v. Reproductive Health Services*, No. 88-605 at 4-6.

outline for how the right should be exercised.[4] *Roe v. Wade*, 410 U.S. at 156. In that case, however, this Court declined to rule that the newly discovered right was broad enough to encompass the decision of a minor to terminate her pregnancy. *Id.* at 165 n.67. In 1976, when the issue was presented, this Court concluded that a child had at least some protected privacy interest that precluded an absolute decision on her behalf by her parents, backed by the authority of the law. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). Although this Court discussed the rights of minors to seek and obtain abortions without regard to the views of their parents, the Court's holding does not use language that reflects the adolescent in her precise status, namely, an unemancipated minor whose most fundamental relationship is not with her physician but with her parents.[5] Instead, it created a conflict between a "patient" (the adolescent) and a "third party" (her parents) and resolved the supposed struggle in favor of the "decision

[4] The Court essentially acts "legislatively" any time it announces rules or guides the subsequent action of the legislature. *Compare Berger v. New York*, 388 U.S. 41 (1967) *with* Omnibus Crime Control Act, Title III, 18 U.S.C. §§ 2510, *et seq.* Nonetheless, the Court's abortion jurisprudence goes much further than other examples of judicial direction of legislation. Whereas other illustrations draw distinctions or offer singular guidance, abortion cases are repetitious and divisive, and involve the courts in readjusting delicate balances, resolving matters of deep dispute, and redrafting the intricate details of statutes and regulations.

[5] Justice Stevens dissented, and implied that there was some broader role for the States to play in this jurisprudence. For example, in *Danforth* he would have voted to uphold the parental consent requirement as consistent with the holding in *Roe*. 428 U.S. at 102-103. On balance, Justice Stevens indicated that "a legislative determination that children should be entitled to the advice and moral support of parents is not irrational." Indeed, he pointed out the absence of focus by the majority on the status of the child and relationship with her parents, and the unseemly focus on the relationship with the physician as the "constitutionally permissible yardstick for determining whether a young woman can independently make an abortion decision." *Id.* at 105.

of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding [parental] consent." *Id.* (emphasis added).

By 1979, the Court took further legislative action in *Bellotti v. Baird (II)*, 443 U.S. 622 (1979),[6] when it not only held the Massachusetts consent law invalid but also specified the circumstances under which parental consent could be valid and included an outline for what has become known as a judicial bypass procedure. It should therefore not have been surprising that in *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476, 490-91, 505 (1983), such a statute was upheld when it followed the recipe offered in *Bellotti II*. Although the present cases deal with parental notice rather than consent, the same kind of detailed judicial direction is common nonetheless.

In these many years of abortion litigation, in only one case has this Court ruled directly on parental notice.[7] In *H. L. v. Matheson*, 450 U.S. 398 (1981), the Court upheld a Utah parental notice statute but only after the majority narrowed the class represented by the plaintiffs to unemancipated dependent minors. It did not answer the question presented by the statute precisely, nor did

[6] In 1976 the Court in *Bellotti v. Baird (I)*, 428 U.S. 132 (1976), held open the prospect that the Court might defer to legislative judgment in particular cases by abstaining from passing on the particulars of the Massachusetts statute until the Massachusetts Supreme Judicial Court had construed that law. By abstaining, this Court reserved the right to decide in appropriate cases when consent could be required and under what circumstances, and decided *not* to strengthen the legislative role. *See Bellotti v. Baird (II)*, 443 U.S. 622, 656 n.4 (1979).

[7] In *Hartigan v. Zbaraz*, 484 U.S. 171 (1987), this Court divided evenly without opinion on the validity of a State statute that coupled parental notice with a waiting period. That order left standing a lower court determination that such a law was unconstitutional. 763 F.2d 1532 (7th Cir. 1985). Unfortunately, despite the narrow effect of the ruling, one of the courts below attempted to read some larger precedential principle into it. *Akron Center v. Slaby*, 854 F.2d at 861.

it answer the question posed by Justice Stevens in his concurring opinion. Justice Stevens pointed out that unlike parental consent laws, parental notice involved a much different calculus of competing values, most notably because it did not require a final parental decision. The principles he espoused in earlier cases (note 5, *supra*) "plainly dictate[d] that the Utah statute now before us be upheld." 450 U.S. at 421. Because the majority specifically narrowed the scope of its own decision, *H. L. v. Matheson* became the subject of speculation in the next series of abortion cases.

In *Akron v. Akron Center for Reproductive Health*, the majority asserted, but did not decide, that an "alternative procedure" is required under any law that would provide for parental involvement in their child's abortion decision. 462 U.S. 416, 428 n.10 (1983). Lower courts reading the Akron majority *dicta* believe they have divined both the mind of the Court favoring particular kinds of statutes as well as the specifics of the "legislative" relief that this Court would provide if the case were presented. *E.g., Glick v. McKay*, 616 F. Supp. 322, 324-25 (D. Nev. 1985).[8] This supposed need for an alternative procedure has invited the lower courts in these very cases to mandate the specifics of parental notice statutes. *Akron Center v. Slaby*, 854 F.2d at 860-61; *Hodgson v. Minnesota*, 853 F.2d at 1455-56. That this issue was not even presented in *H. L.*, as pointed out by Justice O'Connor in *Akron*, 462 U.S. at 469 n.12, was not discussed in those cases. Nor was it apparent that

[8] In the cases at bar, the Ohio litigation is truly a paradigm of the inability of the legislature to legislate. Juris. Stat. at 16. In that case, the court of appeals rejected the statute simply on the alleged inadequacy of various details in the bypass or "alternative" procedure. It is difficult to imagine how a court could act less like a court and more like a legislature in deciding how a statute *should* be constructed. The point is not how an "alternative" procedure is designed or even if one is "required." Rather, the decisionmaker and the designer should be the State legislature, not a federal court.

this kind of judicial role was inappropriate, or subject to any limits.

As the plurality in *Webster v. Reproductive Health Services* noted, the Court's abortion jurisprudence has indeed become "a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine." 109 S.Ct. at 3057. The solution to these cases does not lie in adding to the weave of the fabric but in untangling it. When courts usurp the legislative role, they frustrate not only the legislatures but themselves. *Id.* "The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not." *Id.* at 3058. When the legislature balances competing interests to promote meaningful family consultation on issues that are deeply life-affecting, that legislative judgment is entitled to great respect and, unless plainly unconstitutional, should be sustained.

B. Judicial Review of State Health and Welfare Laws Should Exhibit Deference to the Legislative Process.

Chief Justice John Marshall once counseled that judging the unconstitutionality of State legislation was a task of "much delicacy, which ought seldom, if ever to be decided in the affirmative in a doubtful case." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810). *See Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 415 (1850). Legislation should not be voided "on slight implication and vague conjecture." *Fletcher v. Peck*, 10 U.S. (6 Cranch) at 128. Rather, in reviewing the conformance of a statute with the Constitution, a court must not so act unless and until it forms "a clear and strong conviction of their incompatability [sic] with each other." *Id.* The philosophy inherent in Chief Justice Marshall's admonition is judicial restraint—that courts reach constitutional issues only when strictly necessary. Among other

things, this philosophy serves "the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority." *Rescue Army v. Municipal Court*, 331 U.S. 549, 571 (1947).

The constitutional authority to resolve public debates over which actions shall be undertaken in the public interest is entrusted primarily to the legislative branch. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21, 423 (1819). A legislature's role in matters affecting important health and safety interests is paramount, especially when it resolves matters of intense public controversy.[9] *See Webster v. Reproductive Health Services*, 109 S.Ct. at 3058; *Berman v. Parker*, 348 U.S. 26, 33 (1954); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 794-96 (1986) (White, J., dissenting). It is not the province of a court to frustrate the legislative will because the law "may seem to the judges who pass upon it, excessive, unsuited to its ostensible end, or based on conceptions of morality with which they disagree." *Otis v. Parker*, 187 U.S. at 608; *see Baltimore Gas & Electric Company v. NRDC*, 462 U.S. 87, 97 (1983); B. Cardozo, *The Nature of the Judicial Proc-*

[9] In the juvenile death penalty cases, this point has been amply illustrated. In *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2698-99 (1988), a plurality decided there were numerous State statutes expressing the view that minors did not have the experience, education, or maturity to evaluate the consequences of their conduct, citing, among other things, *Bellotti v. Baird*. *See id.* at 2709 (O'Connor, J., concurring). This rule of law was strengthened, not vitiated, by reconsideration of the juvenile death penalty cases in the last Term. *Stanford v. Kentucky* stands for the proposition that the jury system is best suited to determine individual responsibility *in the absence of some considered legislative judgment* evaluating the entire class of juveniles. 109 S.Ct. 2969, 2975-76 (1989). Thus the views expressed last Term reinforced the principle that legislative judgments on matters within their competence should ordinarily be upheld. Unfortunately, that has not always been the case when abortion statutes are involved. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

ess, 141 (1921). Rather, it is incumbent upon those attacking a statute to show that the law is "clearly incompatible" with the Constitution. *Legal Tender Cases*, 79 U.S. at 530-31. Although courts are and should be vigilant in the protection of fundamental rights (such as religious freedom), the means by which the courts act are essentially procedural, allocating burdens of proof and setting standards of certitude. Courts do not displace the legislative process entirely, especially where there is more than one claim to a fundamental interest.[10]

Because the intricate jurisprudence of this Court on abortion has departed from these normative principles, it continues to frustrate even a carefully exercised and balanced legislative will. The problem lies in the nature of the jurisprudence rather than in particular statutes that come before the Court. The law becomes more cumbersome to administer, and more difficult to predict with certainty by the States. *Thornburgh v. American College*, 476 U.S. at 814 (O'Connor, J., dissenting). The answer for the Court, not just for these cases, but for the many cases to come, lies in a thorough reconsideration of the line of cases that begins with *Roe v. Wade*. Such a reconsideration was demanded by the dissenters in *Thornburgh* and *Akron* and finally broached by a plurality in *Webster*. While there may be merit in the

[10] In abortion decisions, the calculation is never simply one of individual interests competing with interests of the State. The choices made in an abortion decision are complex and certainly affect the life interests of others: the unborn child, the father, other members of the family, and society itself. S. Jordan, *Decision Making for Incompetent Persons* 19 (1985). The decision implicates the procreative interests of both partners, can affect the sanctity of a marriage relationship, ends a life, and has other impacts on family relations, alienating children from their parents and separating those parents from their unborn grandchildren. It subjugates liberties that in other contexts are found to be fundamental, but in this context are found to be less worthy of protection. J. Noonan, *A Private Choice: Abortion in America in the Seventies* 90-95, 190 (1979).

suggestion that such reconsideration should allow "time enough . . . to do so carefully," *Webster*, 109 S.Ct. at 3061 (O'Connor, J., concurring), the problem grows more urgent with each case. For this Court the time has come to decide whether to continue to write rules or to allow legislatures to legislate. *Akron*, 462 U.S. at 456 (O'Connor, J., dissenting).

II

A STATE MAY PERMISSIBLY REQUIRE NOTICE TO PARENTS OF THEIR MINOR DAUGHTER'S INTENTION TO SEEK AN ABORTION AND A REASONABLE CHANCE FOR THEM TO CONFER WITH HER PRIOR TO EXECUTION OF HER DECISION TO ABORT HER CHILD.

Both States present a plain, and plainly valid, argument to this Court through their respective parental notice laws: parents should know about and be involved in life-affecting decisions made by their children. Such a proposition would appear to be beyond dispute. However, those who oppose parental notice in these cases suggest that these legislative efforts neither aid families nor promote legitimate exercise of rights, to the extent that parents may act to deny their adolescent daughters unfettered access to abortion. By framing the debate in these cases as a conflict between parents' rights and children's rights, those opponents have missed the most important point. This Court has cautioned against "intrusion by a State into family decisions," *Wisconsin v. Yoder* 406 U.S. 205, 231 (1972), delineating instead a "private realm of the family which the State cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). As with other significant subjects that might come up from time to time within a family, the family must be given the opportunity to consider and resolve for itself matters relating to abortion.

A. Protection of Family Integrity Is an Important Public Welfare Interest that Merits Legislative Protection.

The mutual support and interdependence of family members have been strongly endorsed and protected in American law. "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." *Lehr v. Robertson*, 463 U.S. at 256. Protection of the family is a principle of life and law "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).[11]

Drawing on this rich historical tradition, this Court found the "natural duty of parents" to educate their children to be part of the fourteenth amendment liberty interest in marriage, establishing a home, and raising children. *Meyer v. Nebraska*, 262 U.S. 390, 399, 400 (1923). Parental nurture and direction of children is more than a "right" but a "high duty." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).[12] In *Prince v. Massachusetts*, this Court stated:

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[11] At common law in England and in the United States, the duties of parents to maintain, support, and educate their children were well-established. I W. Blackstone, *Commentaries on the Laws of England*, Ch. 16, 435, 440-41 (1765); II J. Kent, *Commentaries on American Law*, 160 (Da Capo ed. 1971). The duties of children relative to their parents were also well-established. *Id.* The common law family relationship may be described as mutual and reciprocal. I Blackstone at 440-41; II Kent at 170-73. Each member was bonded to the other in what one court called a "mutual interest in interdependence." *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977). *See* Hafen, "Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to their *'Rights,'*" 1976 *B.Y.U. L.Rev.* 604, 615-17, 651-52.

[12] The Court in *Wisconsin v. Yoder*, 406 U.S. 205, 213, 232 (1972) described *Pierce v. Society of Sisters* as a "charter of the

> It is cardinal with us that the custody, care and nurture of the child must reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder. And it is in recognition of this that these decisions [*Meyer* and *Pierce*] have respected the *private realm of the family which the State cannot enter.*

321 U.S. at 166 (emphasis added); *see Ginsburg v. New York*, 390 U.S. 629, 639 (1968).[13] The "primary role of the parents in the upbringing of their children is now established as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. at 232.

Children, however, have rights as against certain kinds of parental actions and as against the State. Children cannot, at their parents' direction, be refused beneficial medical treatment or subjected to extensive work hours. *See Application of President and Directors of Georgetown College*, 331 F.2d 1000, 1007-1008 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *Prince v. Massachusetts, supra.* Similarly, children cannot be denied rights to political expression or to an expectation of privacy in public schools. *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 506, 511 (1969); *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985). Nor can children be

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rights of parents to direct the religious upbringing of their children." If anything, this should apply even more strongly to situations involving consideration of abortion where strong moral and religious convictions are implicated.

[13] In *Ginsburg v. New York*, the Court upheld a statutory ban on sale of non-obscene but adult-oriented magazines to all minors. 390 U.S. 629 (1968). The Court observed it "has consistently recognized that the parents' claim to authority in their own household is basic in the structure of our society [quotation from *Prince v. Massachusetts* omitted]. The legislature could properly conclude that parents . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." 390 U.S. at 639.

deprived of liberty without due process in public schools or in courts. *Goss v. Lopez*, 419 U.S. 565, 574, 575 (1975); *In Re Gault*, 387 U.S. 1, 13 (1967). The Court has not automatically either extended these rights to children, or granted them the full adult scope of the rights; both actions have been made dependent upon the nature of the countervailing State and parental interests. *E.g., McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

The resulting blend of "rights," "duties," and "obligations" is the family unit as it is now recognized in the law.[14] Although it has recognized children's "rights," the Court has affirmed the principle that parents play a "substantial, if not the dominant role" in their children's lives. *Parham v. J.R.*, 442 U.S. 584, 604 (1979); *see Wisconsin v. Yoder*, 406 U.S. at 244 (Douglas, J., dissenting). This role is displaced only where there is a serious threat to the child's health or safety or a "potential for significant social burdens." *Id.* at 233-34; *see Thornburgh*, 476 U.S. at 793 n.2 (White, J., dissenting). Even in families where relations between parents and children are strained, parents, because of their interest in preventing the "destruction of their family life," must have a chance to resolve their problems apart from State interference. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).[15]

In *Bellotti v. Baird (II)*, the plurality strongly endorsed the need for familial involvement in the lives of dependent children. 443 U.S. at 634, 640. Protection of family integrity may be advanced even in competition

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[14] Hafen, *supra* note 11 at 616-17 and authorities noted therein.

[15] This Court recently reaffirmed its long-standing deference to legislative judgments preserving the integrity of the marital family against asserted rights to establish paternity. *Michael H. v. Gerald D.*, 109 S.Ct. 2333, 2342, 2345 (1989).

with the separate interests of its members. "The unique role in our society of the family . . . requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children." *Id.* at 634. In particular, relying on *Ginsburg v. New York* and *Prince v. Massachusetts*, the plurality noted that "minors often lack the experience, perspective and judgment to recognize and avoid choices that could be detrimental to them." *Id.* at 635-36.

Although neither lower court in the cases on review disputed these principles,[16] the opponents of the legislation in effect urge this Court to abandon the time honored conclusion that the integrity of the family unit is itself a privacy interest deserving constitutional protection. *Lehr v. Robertson*, 463 U.S. at 258. For reasons developed below, in many cases such as the present, that interest is superior to and may limit the interest of a minor in unfettered access to abortion. More to the point, protection of the family is sufficiently important to justify appropriate limitations on a minor's access to abortion on her exclusive demand. "There is . . . an important State interest in encouraging a family rather than a judicial resolution of a minor's abortion decision." *Id.* at 648. This case presents an opportunity to reaffirm that principle.[17]

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[16] *Akron Center v. Slaby*, 854 F.2d at 857-58; *Hodgson v. Minnesota*, 853 F.2d at 1555.

[17] The Catholic Church's moral teaching on the role of and protection for the family reflects similar considerations. The Vatican Charter of the Rights of the Family (Oct. 22, 1983) provides that: "[p]ublic authorities must respect and foster the dignity, lawful independence, privacy, integrity and stability of every family (Article 6)." The Bishops of the United States have long recognized the need to stabilize and strengthen family life. U.S. Bishops, *Statement on the Christian Family* ¶¶ 8-10 (Nov. 21, 1949); USCC Administrative Board, *Political Responsibility: Choices for the 1980s* ¶¶ 42-43 (Oct. 26, 1979) (Rev. Ed. Mar. 22, 1984). They have likewise recognized that parents may not do that which is injurious to their children. U.S. Bishops' Committee for Pro-Life Activities and American Jewish Congress, *Joint Statement on Treatment of Handicapped Newborns* (1985).

B. The Court Should Reject Efforts to Redraft State Statutes that Promote the States' and the Family's Interests in Family Integrity.

Parental notice statutes are well within the permissible range of legislative action under this Court's family jurisprudence. Through these statutes, the States assure some private space for a family to discuss an adolescent's decision to seek an abortion. *Bellotti v. Baird (II)*, *supra*. It is as if the State has drawn a line around the family members to shield them for a brief moment to allow discussion of a decision that intimately affects the entire family relationship.[18] Both the parents' rights and their child's rights are implicated by abortion. *Akron v. Akron Center for Reproductive Health*, 462 U.S. at 428 n.10 (1983). The child's desire for her solution can strain against her parents' natural desire to provide guidance, direction, and support in making a responsible decision. In that time and private space, no one "right" is more important than the others. The integrity of the family is at stake. In devising such a statute, the legislature may decide that the family members normally act out of love, concern, and respect for each other. Evidence that a statute is not operating as designed, or that perhaps the legislature incorrectly balanced the various outlooks and perspectives, should not be presented to a court on judicial review, but rather should be presented to the legislature which has the constitutional authority in the first instance to make such a resolution. *Maher v. Roe*, 432

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[18] "The importance of the familial relationship, to the individual involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' . . . ." *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977) (citing *Wisconsin v. Yoder*, 406 U.S. at 231-34).

U.S. 464, 479 (1977). In a doubtful case, in which there are various viewpoints in competition with each other in the legislature, that judgment itself may not be displaced because it is alleged to be unwise or impractical.

What the statutory opponents demand of this Court is that federal district courts become the means by which such legislative action is reconsidered and refined. They insist that, although legislatures may act on the basis of factual presumptions in enacting statutes, subsequent evidence that casts doubt on the wisdom or efficacy of a particular approach and its underlying presumptions is an adequate basis for any court to declare that statute unconstitutional. Hodgson Petition for Writ of Certiorari at 16-17, 21, 23.[19] As the *Hodgson* court noted, the opponents' record in the district court "raise[d] considerable questions about the practical wisdom of this statute. Nevertheless, we believe these are questions for the legislature." 853 F.2d at 1459. The opponents' renewed insistence that the lower courts should have relied only on the trial record that they created[20] appears to be nothing more than a guise to entice a court to substitute its judgment for that of a legislature. Redrafting the law should be the task of those who initially weighed the competing evidence and resolved conflicts in drafting the statute.

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[19] In that petition, the statutory opponents urge the Court to void not just Minnesota's two parent notice statute, but more broadly, "to revisit the question of the constitutionality of [notice] laws . . . on the factual record herein." Hodgson Petition at 17. Such an action would not only be inappropriate for lack of standing and other reasons, it shows the reach of the opponents' aims—to shut children off from parents.

[20] For example, the overwhelming majority of witnesses testified as part of the opponents' main case in *Hodgson v. Minnesota*, 648 F. Supp. 756, 774 (D. Minn. 1986). The district court nonetheless found that parental notice was effective. *E.g.*, Finding 58, *id.* at 766.

These are not cases in which the States blur the distinction between facial and operational challenges by urging a more rational and deferential judicial review. If a statute that is valid on its face nonetheless unduly burdens a constitutional right in practice, a court is free to consider that evidence and so rule without engaging in "legislative" activity. Here, only some of the argument or evidence goes to the application of either statute on review. The bulk of the opponents' case is directed at pushing this Court to redraw lines already set by the legislature, something a court may not do. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 541 n.10 (1976). These opponents, having lost in their legislatures, seek to enlist the courts in refighting their battles. Why these opponents could not just as readily reopen the legislative process goes unexplained. One searches the opponents' papers and the opinions below in vain for some reason excusing their abandonment of the legislative process.

One possible excuse implicit in the opponents' position lies in the fact that this Court continues to describe a woman's choice of abortion in constitutional terms. Although this *amicus* plainly disagrees, assuming *arguendo* the existence of a constitutional right, there is still no reason to second-guess legitimate choices designed to protect the family. First, the mere existence of a constitutional right does not empower the judiciary to assume a greater role. The first amendment interest advanced in *Ginsburg v. New York* is presumably no less fundamental. 390 U.S. at 636. Yet this Court flatly refused to sustain a child's interest as the dominant concern, siding instead with the legislature and the parents' obligations and interests. *Id.* at 639. Neither the absence of an opportunity to demonstrate "emancipation" or "maturity," nor the prospect of a parental veto was fatal. Likewise in the abortion context, at least a plurality has recognized that advancement of parental authority was not "inconsistent with our tradition of in-

dividual liberty . . . . Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Bellotti v. Baird (II)*, 443 U.S. at 639. This implicit acknowledgment of the parents' fundamental rights offers more, not less, reason for deference to legislation that seeks to balance and resolve various concerns.

Second, the mere existence of a constitutional right does not guarantee the corresponding capacity to exercise it wisely. For this reason there are many restrictions on otherwise available and necessarily private choices for adolescents, without regard to "emancipation" or "maturity," including, *inter alia*, the privilege to drink, drive an automobile, marry, make purchases or enter into contracts. *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2698-99 (1988); *see* note 9, *supra*. Yet opponents of parental notice accompanied by a waiting period for family discussion assert that such statutes "unduly burden" a minor's decision to obtain an abortion because parents might, on occasion, discourage the abortion that these opponents have decided is in the best interests of all minors.[21] This assertion involves two erroneous assumptions—that parents act contrary to their children's best interests and that abortion *is* in the best interests of the child.

As to the first assumption, our common law heritage from Blackstone and Kent to the most recent decisions of this Court (see note 11, *supra*) presumes that the

[21] For example, one of the principal pieces of evidence that the opponents have used against the Minnesota law is the statistic that the teenage birthrate has increased over the duration of the statute, while remaining more or less constant for the age group not covered by the statute. The implicit assumption is that those births would or should have been prevented by abortion. Hodgson Petition at 11 n.16. This is relevant only if there is a mandate to perform as many abortions as possible.

"natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. at 602. Although "experience and reality may rebut what the law accepts as a starting point . . ., [s]imply because the decision of a parent is not agreeable to the child or because it involves risks does not automatically transfer the power to make that decision from the parents . . . ." *Id.* at 602, 603. This Court has repeatedly resisted the suggestion that it presume the worst. *H.L. v. Matheson*, 450 U.S. at 413; *Wisconsin v. Yoder*, 406 U.S. at 232. Where evidence exists as to specific concerns, it does not serve the public interest for this Court, on the basis of "expert" opinion in one trial court, to upset centuries of tradition.[22] Respecting parental rights and familial obligations, other decisions of this Court allow parents a "substantial, if not the dominant role" in making medical treatment decisions for their children. *Parham v. J.R.*, 442 U.S. at 604 (analyzing and rejecting *Danforth*). Because this Court has found that "children, even in adolescence, simply are not able to make sound judgments concerning . . . medical care or treatment," *Parham v. J.R.*, 442 U.S. at 603, it must not divest parents of meaningful input to their dependent child's abortion decision. What the Court recognized in *H.L. v. Matheson*, 450 U.S. at 412-13, about the grave consequences of abortion strengthens the need for effective and meaningful parental involvement.

As to the second assumption, *H.L. v. Matheson* authoritatively dismissed the assertion that abortion is in the child's best interest:

[22] If this is not the measure for constitutional adjudication, it would be just as reasonable for this Court to note the existence of contrary expert opinion supporting the need for parental consultation in these circumstances. Rue, "Abortion in Relationship Context," 9 *Int'l Rev. of Natural Family Planning* 95, 97-99 (1985). Crisis, argument, and discussion are inherent in family decision-making. Fear of the process does not justify judicially mandated avoidance by those who stand to benefit most.

> If the pregnant girl elects to carry her child to term, the *medical* decision to be made entails few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort.

450 U.S. at 412-13; *see id.* at 411 and n.20 (describing unique medical, emotional and psychological complications associated with an adolescent's decision to have an abortion not present in adult cases). These considerations are particularly important in the abortion context:

> The abortion decision differs in important ways from other decisions that may be made during minority.
>
> • • • •
>
> [C]onsidering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. . . . [T]here are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.
>
> Yet, an abortion may not be the best choice for a minor. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interest.

Bellotti v. Baird (II), 443 U.S. at 642-43.[23] G. Melton (ed.), *Adolescent Abortion: Psychological and Legal*

[23] The plurality endorsed Justice Stewart's view that the State may encourage a minor "to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Id.* at 641 (quoting *Planned Parenthood v. Danforth*, 428 U.S. at 91 (Stewart, J., concurring)). Justice Stewart tied his reliance on parental involvement to the fact that the adolescent "under emotional stress, may be ill-equipped to make [the decision] without mature advice and emotional support." *Planned Parenthood v. Danforth*, 428 U.S. at 91 (Stewart, J., concurring). Clinic personnel, with an economic interest at stake, would not likely offer such "counsel and support." *Id.* As the plurality expanded in *Bellotti v. Baird (II)*, 443 U.S. at 642 n.21: "Many minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent and unethical." Parental "consulation and consent" are the "traditional way by which states have sought to protect children from their own immature and improvident decisions." *Planned Parenthood v. Danforth*, 428 U.S. at 95 (White, J., dissenting).

Issues 84 (1986). Those consequences are too grave to secure unrestricted exercise of the abortion decision for minors.

The effort to overturn the considered judgment of the legislatures, advancing meaningful family discussion over the *de minimis* "burden" imposed on the adolescent, must be firmly rejected. In *H.L. v. Matheson*, *supra*, this Court found that any inhibition of the decision to obtain an abortion based on actual or perceived parental action due to statutory notice was of *no* constitutional significance. Moreover, this Court has upheld consent statutes which present the possibility that parents may withhold consent and there may be *no* abortion. *Planned Parenthood Ass'n v. Ashcroft*, *supra*. Given these prior decisions, the statutes challenged here are plainly constitutional

It is not the province of the courts to speculate about the quality of family relations and about the wisdom of particular legislation. *See Otis v. Parker*, 187 U.S. at 608. To do so is to exercise judicial review by, as John Marshall stated, "slight implication and vague conjecture." *Fletcher v. Peck*, *supra*. Unless the legislation is "clearly incompatible" with the Constitution, *Legal Tender Cases*, *supra*, it may not be set aside. Here, both Ohio and Minnesota were on firm constitutional ground in striving to balance important life interests. The opponents of these parental notice statutes seek to discourage parental involvement in their children's lives. Allowing them to succeed contravenes important constitu-

tionally protected interests, and sacrifices family integrity to the adolescent's perceptions of self-interest. There is simply no legitimate basis upon which to allow rejection of the statutes in question.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be reversed and the judgment of the Court of Appeals for the Eighth Circuit should be reversed in part and affirmed in part.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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Nos. 88-805, 88-1125, 88-1309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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JANE HODGSON, M.D., *et al.*,

Petitioners,

v.

THE STATE OF MINNESOTA, *et al.*,

Respondents.

THE STATE OF MINNESOTA, *et al.*,

Cross-Petitioners,

v.

JANE HODGSON, M.D., *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT IN NO. 88-805, AND RESPONDENTS-CROSS-PETITIONERS IN NOS. 88-1125 AND 88-1309

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS*	2
STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THERE IS A LONG LEGISLATIVE AND COMMON-LAW TRADITION RECOGNIZING AND REINFORCING PARENTAL AUTHORITY	5
A. Marriage	5
B. Travel	8
C. Contract	10
II. THIS COURT HAS LONG RECOGNIZED THAT PARENTAL AUTHORITY IS AFFIRMATIVELY PROTECTED BY THE CONSTITUTION	11
III. *DANFORTH* AND *BELLOTTI II*—AS WELL AS *ROE*—ARE ABERRATIONS IN THE LAW, AND SHOULD BE REPUDIATED	16
A. *Danforth* and *Bellotti II* Are Incompatible With The *Pierce* Line of Cases	16
B. The Lower Courts' Decisions Highlight The Flaws In *Roe*	21
CONCLUSION	23

TABLE OF AUTHORITIES

CASES:	Page
Akron v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983)	18
Akron Center for Reproductive Health v. *Slaby*, 854 F.2d 852 (6th Cir. 1988)	2
Bellotti v. *Baird*, 428 U.S. 132 (1976)	17
Bellotti v. *Baird*, 443 U.S. 622 (1979)	*passim*
Ginsberg v. *New York*, 390 U.S. 629 (1968)	14, 20
Haig v. *Agee*, 453 U.S. 280 (1981)	10
H.L. v. *Matheson*, 450 U.S. 398 (1981)	18
Hodgson v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) *(en banc)*	2, 21
Loving v. *Virginia*, 388 U.S. 1 (1967)	5
McNeil v. *Director Patuxent Institution*, 407 U.S. 245 (1972)	13
Meyer v. *Nebraska*, 262 U.S. 390 (1923)	11, 14
Michael H. v. *Gerald D.*, 109 S. Ct. 2333 (1989)	12, 15
O'Connor v. *Donaldson*, 442 U.S. 563 (1975)	13
Parham v. *J.R.*, 442 U.S. 584 (1979)	13, 14, 19, 20
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925)	*passim*
Planned Parenthood Ass'n of Kansas City v. *Ashcroft*, 462 U.S. 476 (1983)	18
Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976)	*passim*
Poe v. *Ullman*, 367 U.S. 497 (1961)	21
Prince v. *Massachusetts*, 321 U.S. 158 (1944)	15, 20
Roe v. *Wade*, 410 U.S. 113 (1973)	4, 21
Rowan v. *Post Office Dep't.*, 397 U.S. 728 (1970)	14, 15
Santosky v. *Kramer*, 455 U.S. 745 (1982)	15, 16
Shapiro v. *Thompson*, 394 U.S. 618 (1969)	8, 9
Smith v. *Organization of Foster Families*, 431 U.S. 816 (1977)	4, 20
Stanley v. *Illinois*, 405 U.S. 645 (1972)	15
Thornburgh v. *American College of Obst. & Gyn.*, 476 U.S. 747 (1986)	21
Turner v. *Safley*, 107 S.Ct. 2254 (1987)	5
Webster v. *Reproductive Health Services*, 109 S.Ct. 3040 (1989)	21
Wisconsin v. *Yoder*, 406 U.S. 205 (1972)	12, 13
Zbaraz v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S.Ct. 479 (1987)	18

TABLE OF AUTHORITIES—Continued

U.S. CONSTITUTIONAL PROVISIONS:	Page
Amendment I	12
Amendment XIII	11
Amendment XIV	11
STATUTES AND REGULATIONS:	
10 U.S.C. § 505 (1982)	10
10 U.S.C. § 2104 (1982)	10
10 U.S.C. § 2107 (1982)	10
10 U.S.C. § 2107a (1982)	10
42 U.S.C. § 1981 (1982)	10
22 C.F.R. § 51.27 (1988)	10
Ala. Code § 30-1-5 (1983)	7
Ala. Code §§ 44-2-1—44-2-7 (1987)	9
Alaska Stat. § 25.05.171 (1988)	8
Alaska Stat. §§ 47.15.010—47.15.080 (1988)	9
Ariz. Rev. Stat. Ann. §§ 8-361—8-367 (1989)	9
Ariz. Rev. Stat. Ann. § 25-102 (1976)	7
Ark. Stat. Ann. § 9-11-102-105 (1987)	7
Ark. Stat. Ann. §§ 9-29-101—9-29-108 (1987 & Supp. 1987)	9
Cal. Bus. & Prof. Code § 22-706 (Deering 1989)	11
Cal. Civ. Code § 4101 (West 1983)	7
Cal. Welf. & Inst. Code § 1300 (West 1984 & Supp. 1989)	9
Colo. Rev. Stat. §§ 14-2-106[1][a][I]108 (1987)	7
Colo. Rev. Stat. §§ 24-60-701-708 (1988)	9
Conn. Gen. Stat. Ann. §§ 17-15—77-81 (West 1979 & Supp. 1988)	9
Conn. Gen. Stat. Ann. § 46b-30 (West 1986)	7
D.C. Code Ann. § 30-110 (1988)	7
D.C. Code Ann. §§ 32-1101—32-1106 (1988)	9, 10
Del. Code Ann. Tit. 13, § 123 (1981)	7
Del. Code Ann. Tit. 31, §§ 5203, 5221—5228 (1985)	9
Fla. Stat. Ann. §§ 39.51—39.516 (West 1988)	9
Fla. Stat. Ann. § 741.04-0405 (West 1986)	7
Ga. Code Ann. § 19-3-2 (1982)	7
Ga. Code Ann. §§ 39-3-1—39-3-7 (1982)	9
Haw. Rev. Stat. §§ 572-1-2 (1985)	7

TABLE OF AUTHORITIES—Continued

	Page
Haw. Rev. Stat. §§ 582-1—582-8 (1985 & Supp. 1988)	9
Idaho Code §§ 16-901—16-1910 (1979)	9
Idaho Code § 32-202 (1979)	7
Ill. Rev. Stat. ch. 23, ¶¶ 2591 to 2597 (Smith-Hurd. 1988)	9
Ill. Rev. Stat. ch. 40, ¶ 203 (Smith-Hurd 1982)	7
Ind. Code Ann. §§ 31-6-10-1—31-6-4 (West 1979 & Supp. 1989)	9
Ind. Code Ann. §§ 31-7-1-6, 31-7-1-7, 31-7-2 (Burns 1980 & Supp. 1986)	7
Iowa Code § 232.171-72 (1980 & Supp. 1989)	9
Iowa Code § 595.2 (1980 & Supp. 1989)	7
Kan. Stat. Ann. § 23-106 (1988)	7
Kan. Stat. Ann. § 38-1001 (1986)	9
Ky. Rev. Stat. § 208-600—670 (1988)	9
Ky. Rev. Stat. § 402-210 (1988)	7, 8
La. Rev. Stat. Ann. § 9:211 (Supp. 1989)	7
La. Rev. Stat. Ann. §§ 46:1451—46:1458 (West 1982 & Supp. 1989)	9
Me. Rev. Stat. Ann. Tit. 19, § 62 (1981 & Supp. 1988)	7
Me. Rev. Stat. Ann. Tit. 34-A, §§ 9001—9016 (1988 & Supp. 1989)	9
Mass. Gen. Laws Ann. ch. 119 App., §§ 1-1—1-7 (West 1969 & Supp. 1989)	9
Mass. Gen. Laws Ann. ch. 207, §§ 7, 24, 25 (West 1987 & Supp. 1989)	8
Md. Fam. Law Code Ann. § 2-301 [b] (1984 & Supp. 1988)	7
Md. Health-General Code Ann. §§ 6-301—6-310 (1982 & Supp. 1989)	9
Mich. Comp. Laws Ann. §§ 3.701—3.706 (West 1982 & Supp. 1989)	9
Mich. Comp. Laws Ann. § 551.51 (West 1988)	7
Minn. Stat. Ann. §§ 260.51—260.57 (West 1981 & Supp. 1989)	9
Minn. Stat. § 517.02 (1969 & Supp. 1989)	7
Miss. Code Ann. § 93-1-5 (1972 & Supp. 1988)	7

TABLE OF AUTHORITIES—Continued

	Page
Miss. Code Ann. §§ 43-25-1—43-25-17 (1981)	9
Mo. Ann. Stat. §§ 210.570—210.600 (Vernon 1983 & Supp. 1989)	9
Mo. Ann. Stat. § 451.090 (Vernon 1986)	7
Mont. Code Ann. § 40-1-213 (1989)	7
Mont. Code Ann. §§ 41-6-101—41-6-106 (1989)	9
Neb. Rev. Stat. § 42-105 (1988)	7
Neb. Rev. Stat. §§ 43-1001—43-1009 (1989)	9
Nev. Rev. Stat. § 122.020 (1985)	8
Nev. Stat. §§ 214.010—214.060 (1985)	9
N.H. Rev. Stat. Ann. § 169-A:1 (1983 & Supp. 1988)	9
N.H. Rev. Stat. Ann. § 457 (1983 & Supp. 1988)	8
N.J. Stat. Ann. §§ 9.23-1—4 (West 1968 & Supp. 1989)	9
N.J. Stat. Ann. §§ 37.1, 37.6 (West 1986 & Supp. 1989)	8
N.M. Stat. Ann. §§ 40-1-5—6 (1987)	8
N.M. Stat. Ann. §§ 32-3-1—32-3-8 (1978)	9
N.Y. Dom. Rel. Law § 15 (McKinney 1988)	7
N.Y. Unconsul. Law §§ 1801—1806 (1979 & Supp. 1989)	9
N.C. Gen. Stat. § 51-2 (1988 & Supp. 1988)	7
N.D. Cent. Code § 14-03-02, 14-17 (1981 & Supp. 1989)	7
N.D. Cent. Code §§ 27-22-01—27-22-06 (1974 & Supp. 1989)	9
Ohio Rev. Code Ann. §§ 2151.56—2151.61 (Baldwin 1989)	9
Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984)	7, 8
Okla. Stat. Ann. Tit. 10, §§ 531—537 (West 1987 & Supp. 1989)	9
Okla. Stat. Ann. tit. 43 § 3 (West 1979)	7
Or. Rev. Stat. § 106.060 (1983 & Supp. 1988)	7
Or. Rev. Stat. §§ 417.01—417.080 (1987)	9
Pa. Stat. Ann. Tit. 48 § 1-5 (Purdon 1965 & Supp. 1989)	8
Pa. Stat. Ann. Tit. 62 § 731 (1968 & Supp. 1989)	9
R.I. Gen. Laws §§ 14-6-1—14-6-11 (1989)	9
R.I. Gen. Laws § 15-2-11 (1989)	8
S.C. Code Ann. § 20-1-260—270 (Law. Co-op 1985)	7

TABLE OF AUTHORITIES—Continued

	Page
S.C. Code Ann. 1976, § 27-17-10	9
S.D. Codified Laws Ann. § 25-1-12, 13	7
S.D. Codified Laws Ann. §§ 26-12-1—26-12-13 (1984 & Supp. 1989)	9
Tenn. Code Ann. §§ 37-801—37-806 (1984 & Supp. 1988)	9
Tenn. Code Ann. § 36-3-107 (1984 & Supp. 1988)	8
Texas Fam. Code Ann. §§ 1.51-1.53 (Vernon 1975 & Supp. 1989)	8
Texas Fam. Code Ann. §§ 25.01-09 (Vernon 1986)	10
Utah Code Ann. § 30-1-2 (1989)	7
Utah Code Ann. §§ 55-12-1—55-12-6 (1986)	10
Va. Code Ann. §§ 16.1-323—16.1-330 (1988)	10
Va. Code Ann. § 20-48, 49 (1989)	7
Vt. Stat. Ann. Tit. 18 § 5142 (1981)	8
Vt. Stat. Ann. Tit. 33 §§ 551—575 (1981 & Supp. 1988)	10
Wash. Code § 26.04.010 (1988)	7
Wash. Rev. Code Ann. §§ 13.24.010—13.24.900 (1962 & Supp. 1989)	10
West Va. Code § 48-1-1 (1988)	8
Wis. Stat. Ann. § 765.02[1] (West 1981 & Supp. 1988)	7
Wyo. Stat. § 20-1-102 (1987)	7
Lord Hardwicke's Act, 1753, 26 Geo. 2. ch. 33	5, 6
LEGISLATIVE MATERIALS:	
Cong. Globe, 38th Cong., 1st Sess. (1864)	11
MISCELLANEOUS:	
W. Blackstone, *Commentaries*	5
J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests Of The Child* (1973)	19
Hobbes, *Leviathan* (Fuller, ed. 1952)	4
Locke, *Concerning Civil Government* (Brit. ed. 1952)	4
Restatement (2d) Contracts, §§ 6, 14 (1981)	10
J. TenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951)	11
2 Williston, *Contracts* §§ 222-248 (3d ed. 1959 & Supp. 1989)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-805

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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No. 88-1125

JANE HODGSON, M.D., *et al.*,

Petitioners,

v.

THE STATE OF MINNESOTA, *et al.*,

Respondents.

No. 88-1309

THE STATE OF MINNESOTA, *et al.*,

Cross-Petitioners,

v.

JANE HODGSON, M.D., *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT IN NO. 88-805, AND RESPONDENTS-CROSS-PETITIONERS IN NOS. 88-1125 AND 88-1309

INTEREST OF THE *AMICUS*

Amicus curiae Knights of Columbus is an international organization of 1.4 million members. It has a long history of pro-family advocacy. For example, *amicus* underwrote the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Moreover, a large percentage of its members are themselves parents. Because of its institutional interest, and the interests of its members, *amicus* believes that it can assist the Court by analyzing the impact of the present cases on the broader area of family rights generally. For these same reasons, *amicus* does not believe its interests will be fully attended to by existing parties. All parties have consented to the filing of this brief.

STATEMENT

In *Akron Center for Reproductive Health* v. *Slaby*, 854 F.2d 852 (6th Cir. 1988), and *Hodgson* v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*), the United States Courts of Appeals for the Sixth and Eighth Circuits have held that states may not require that the parents of adolescent girls be notified prior to their daughters' obtaining abortions, unless states provide a so-called "judicial bypass" procedure enabling a judge to determine that the girl is mature enough to decide to have an abortion without telling her parents, or that an abortion is in her best interests. As the Eighth Circuit explained, "[i]n view of the unique nature and consequences of the abortion decision, states do not have the constitutional authority 'to give a third party an absolute, and possibly arbitrary, veto,' over the minor's abortion decision." *Hodgson*, 853 F.2d at 1456, *quoting Bellotti* v. *Baird*, 443 U.S. 622, 643 (1979) (plurality opinion). *See also Akron Center for Reproductive Health*, 854 F.2d at 861 ("we hold that a parental notification statute must provide a bypass procedure that is consistent with the dictates of *Bellotti II*"). The Eighth Circuit upheld Minnesota's parental notification statute, provided that its judicial bypass procedure remains in force. The Sixth Circuit struck down Ohio's statute largely because that court thought the judicial bypass provision inadequate. *Amicus* argues that no "judicial bypass" provision is ever constitutionally required, and thus urges this Court to affirm the Eighth Circuit, except insofar as it found the bypass provision necessary, and to reverse the Sixth Circuit.

SUMMARY OF ARGUMENT

In a nearly unbroken tradition, stretching back to the received English common law, courts and legislatures have recognized that parental authority is not delegated by the state, but rather inheres in the nature of parenthood. Thus, many "fundamental" rights of children have been conditioned on their parents' consent. Children may not marry without their parents' consent. Their interstate travel is largely conditioned on their parents' consent. And their right to enter into contracts is also restricted, and often conditioned on their parents' consent. In a line of cases beginning with *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), this Court has repeatedly emphasized the same principle. Thus, it has insisted that "[t]he child is not the mere creature of the State," but on the contrary, his parents "have the right coupled with the high duty" to direct his education. *Id.* at 535.

Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976), and the cases following it, are incompatible with the *Pierce* line of cases, and with the long-standing tradition of legislative and common-law recognition of inherent parental authority. Most fundamentally, *Danforth* and its progeny err in asserting that the only authority that parents have over their children's abortions is whatever the state is permitted to delegate to them. Parental authority is most emphatically not the product of state delegation, but of nature itself. The lower courts' decisions in these cases further extending *Danforth*'s reasoning to parental notification stat-

utes, like *Danforth* itself, are symptomatic of *Roe* v. *Wade*'s noted tendency for sudden displacement of time-honroed doctrines, and are thus symptomatic of *Roe*'s flawed nature. *Danforth* and its progeny, and *Roe* itself, should be reconsidered and overruled.

ARGUMENT

There is a nearly unbroken legal tradition, Constitutional, legislative and common-law, that the family has its "origins entirely apart from the power of the State." *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 845 (1977). Familial rights are therefore grounded "not in state law, but in *intrinsic* human rights, as they have been understood in 'this Nation's history and tradition.'" *Ibid.* (emphasis added; citations omitted). The family, in short, is logically prior to the State.[1]

That principle has often been codified in legislation recognizing and reinforcing parental authority. Thus, for example, childrens' rights to marry, to travel, and to make certain contracts are conditioned on their parents' consent. With the sole—and rather conspicuous—exceptions of *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), and its progeny, this tradition of family autonomy has been nowhere more forcefully expressed than in the precedents of this Court. *Amicus* respectfully urges the Court to resolve the dissonance created in the law by *Danforth* and *Bellotti* v. *Baird*, 443 U.S. 622 (1979), by restating in this case its long-standing theme of familial autonomy.

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[1] Cf. Hobbes, *Leviathan*, ch. xxii (Fuller, ed 1952) ("For the father and master being before the institution of the Commonwealth absolute sovereigns in their own families, they lose afterward no more of their authority than the law of the Commonwealth taketh from them"); Locke, *Concerning Civil Government*, ch. VI, par. 58 (Brit. ed. 1952) ("The power, then, that parents have over their childen arises from that duty which is incumbent upon them, to take care of their offspring during the imperfect state of childhood").

I. THERE IS A LONG LEGISLATIVE AND COMMON-LAW TRADITION RECOGNIZING AND REINFORCING PARENTAL AUTHORITY.

Through both legislation and common law, both the federal government and the States have long acknowledged parents' authority by requiring their consent for important decisions made by their children.

A. Marriage

The most obvious example is marriage. It is a "fundamental right," *Loving* v. *Virginia*, 388 U.S. 1 (1967), and cannot be denied even to prisoners. *Turner* v. *Safley*, 107 S.Ct. 2254 (1987). Yet the requirement that a child obtain the consent of his or her parents before marrying has remained in force ever since its origins in the English common law.

Blackstone explains that the requirement was designed to reinforce a parent's natural duty:

> [t]he consent or concurrence of the parent to the marriage of his child under age, was . . . directed by our ancient law to be obtained: but now it is absolutely necessary; for without it the contract is void. And this also is *another means, which the law has put into the parents' hands, in order the better to discharge his duty;* first, of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages.

Blackstone's Commentaries, Book 1, Chap. XVI, par. 2 (Oxford 1966) (emphasis added; original emphasis omitted). In 1753, the rule was codified in "An Act for the better prevention of clandestine marriages," which required the consent of a parent or guardian in order for a person under twenty-one to marry.[2] Interestingly,

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[2] The statute provided, in relevant part, as follows: "And it is hereby further enacted, That all Marriages solemnized by License,

that statute allowed for the Chancellor or other officials to approve a "proper" marriage if a party's parent or guardian had been "induced unreasonably . . . to abuse the Truth reposed in him" and to withhold consent. It did *not*, however, provide for application to them in the first instance. And it certainly did not create a mechanism for them to supply their own consent in secret, without the parents' knowledge.

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after the said twenty-fifth Day of *March*, one thousand seven hundred and fifty-four, where either of the Parties, not being a Widower or Widow, shall be under the Age of twenty-one Years, which shall be had without the Consent of the Father of such of the Parties, . . . or if dead, of the Guardian or Guardians . . . and in case there shall be no such Guardian or Guardians, then of the Mother (if living and unmarried) or if there shall be no Mother living and unmarried, then of a Guardian or Guardians of the Person appointed by the Court of *Chancery*; shall be absolutely null and void to all Intents and Purposes whatsoever. XII. And whereas it may happen, that the Guardian or Guardians, Mother or Mothers, of the Parties to be married, or one of them, so under Age as aforesaid, may be *Non compos mentis*, or may be in Part beyond the Seas, or may be induced unreasonably, and by undue Motives to abuse the Truth reposed in him, her or them by refusing or withholding his, her or their Consent to a proper Marriage; Be it therefore enacted, That in case any such Guardian or Guardians, Mother or Mothers, or any of them, whose Consent is made necessary as aforesaid, shall be *Non compos mentis*, or in Parts beyond the Seas, or shall refuse or with-hold his, her or their Consent to the Marriage of any Person, it shall and may be lawful for any Person desirous of marrying, in any of the before-mentioned Cases, to apply by Petition to the Lord Chancellor, Lord Keeper, or the Lords Commissioners of the Great Seal of *Great Britain* for the Time being, who is and are hereby empowered to proceed upon such Petition, in a summary Way; and in case the Marriage proposed, shall upon Examination appear to be proper, the said Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the Time being, shall judicially declare the same to be so by an Order of Court, and such Order shall be deemed and taken to be as good and effectual to all Intents and Purposes, as if the Guardian or Guardians, or Mother of the Person so petitioning, had consented to such Marriage. Lord Hardwicke's Act, 1753, 26 Geo. 2. ch. 33.

All 50 States and the District of Columbia still require parental consent for children to marry.[3] Only 5 states

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[3] Twenty-seven States and the District of Columbia simply require parental consent. *See* Ala. Code § 30-1-5 (1983); Ark. Stat. Ann. § 9-11-102-105 (1987); Cal. Civ. Code § 4101 (West 1983); Del. Code Ann. Tit. 13, § 123 (1981); D.C. Code Ann. § 30-110 (1988); Fla. Stat. Ann. 741.04-0405 (West 1986); Ga. Code Ann. § 19-3-2 (1982); Ill. Ann. Stat. ch. 40, para. 203 (Smith-Hurd 1982); Iowa Code § 595.2 (1980 & Supp. 1989); Ky. Rev. Stat. § 402.210 (1988); La. Rev. Stat. Ann. § 9:211 (Supp. 1989); Md. Fam. Law Code Ann. § 2-301 [b] (1984 & Supp. 1988); Mich. Comp. Laws Ann. 551.51 (West 1988); Miss. Code Ann. § 93-1-5 (1972 & Supp. 1988); Mo. Ann. Stat. 451.090 (Vernon 1986); Neb. Rev. Stat. § 42-105 (1988); N.C. Gen. Stat. § 51-2 (1988 & Supp. 1988); N.D. Cent. Code § 14-03-02, 14-17 (1981 & Supp. 1989); Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984); Okla. Stat. Ann. tit. 43 § 3 (West 1979); Or. Rev. Stat. § 106.060 (1983 & Supp. 1988); S.C. Code Ann. § 20-1-260—270 (Law. Co-op. 1985); S.D. Codified Laws Ann. § 25-1-12, 13; Utah Code Ann. § 30-1-2 (1989); Va. Code Ann. § 20-48, 49 (1989); Wash. Code § 26.04.010 (1988); Wis. Stat. Ann. § 765.02[1] (West 1981 & Supp. 1988); Wyo. Stat. 20-1-102 (1987). Eighteen states require a court's consent, in *addition* to parents' consent, in certain circumstances. For example, in New York an 18-year old may not marry without his or her parent's consent, but a 16-year old may not marry without *both* the consent of his or her parent's *and* that of a state superior court or family court judge. *See* N.Y. Dom. Rel. Law § 15 (McKinney 1988); *see also* Ariz. Rev. Stat. Ann. § 25-102 (1976) (same); Colo. Rev. Stat. § 14-2-106[1][a][I]108 (1987) (same); Conn. Gen. Stat. Ann. § 46b-30 (West 1986) (same); Haw. Rev. Stat. §§ 572-1-2 (1985) (same); Idaho Code § 32-202 (1979) (minors under 18 require parental consent; girls under 16 also require consent of probate court); Ind. Code Ann. §§ 31-7-1-6, 31-7-1-7, 31-7-2 (Burns 1980 & Supp. 1986) (minors between 17 and 18 may marry without parental consent; girl under 15 who is pregnant or has given birth may marry with parental consent and judicial approval); Kan. Stat. Ann. § 23-106 (1988) (both parents' and court's consent required for minors under 18); Me. Rev. Stat. Ann. Tit. 19, § 62 (1981 & Supp. 1988) (minors under 18 require parental consent; minors under 16 also require consent of probate court); Minn. Stat. § 517.02 (1969 & Supp. 1989) (minors under 16 require both consent of parents' and consent of juvenile court); Mont. Code Ann. § 40-1-213 (1989) (minors under 18 require parental consent;

permit a court to consent in lieu of the parents, thus effectively emancipating the minor.[4] None, however, requires such a hearing to be conducted secretly from the parents.

B. Travel

A child's right to interstate travel, which is also a fundamental right, *Shapiro* v. *Thompson*, 394 U.S. 618

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minors under 16 require both parental and consent of district court judge); Nev. Rev. Stat. § 122.020 (1985) (same); N.J. Stat. Ann. §§ 37.1, 37.6 (West 1986 & Supp. 1989) (same); N.M. Stat. Ann. §§ 40-1-5, 40-1-6 (1987) (same); Pa. Stat. Ann. Tit. 48 § 1-5 (Purdon 1965 & Supp. 1989) (same); R.I. Gen. Laws § 15-2-11 (1989) (same); Vt. Stat. Ann. Tit. 18 § 5142 (1981) (same); West Va. Code § 48-1-1 (1988) (same). Five states require parental *or* judicial consent. *See infra*, n.4.

[4] Alaska Stat. § 25.05.171 (1988) (minors between 16 and 18 require parental consent; minors between 14 and 18 may receive court approval if marriage is "in best interest" of minor, and parents either have consented or unreasonably refused consent); Mass. Gen. Laws Ann. ch. 207, §§ 7, 24, 25 (West 1987 & Supp. 1989) (minors under 18 require parental consent; court may waive requirement under specified circumstances); N.H. Rev. Stat. Ann. § 457 (1983 & Supp. 1988) (marriage by minors under 18 prohibited; court may waive disability for boys over 14 girls over 13 in its discretion); Tenn. Code Ann. § 36-3-107 (1984 & Supp. 1988) (minors between 16 and 18 can marry with parental consent, but court may waive disability "upon good cause shown"); Texas Fam. Code Ann. §§ 1.51-1.53 (Vernon 1975 & Supp. 1989) (minors under 18 require either parental consent or court order; minors under 14 require court order). Other states, however, permit judicial consent in the limited circumstances where the girl is pregnant. *See, e.g.*, Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984) (minors under 18 require parental consent; court may consent when girl is pregnant); N.J. Stat. Ann. §§ 37.1, 37.6 (West 1986 & Supp. 1989) (parental consent required for minors under 18; court consent also required for minors under 16; but both requirements waived where girl pregnant); Ky. Rev. Stat. 402.210 (1988) (parental consent required for minors under 18; district court may waive consent requirement, in its discretion, in case of pregnant girl).

(1969), is likewise largely conditioned on his or her parents' consent. Forty-six states and the District of Columbia have enacted the Uniform Interstate Compact on Juveniles,[5] which provides rather elaborate procedures

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[5] *See* Ala Code §§ 44-2-1—44-2-7 (1987); Alaska Stat. §§ 47.15.010—47.15.080 (1988); Ariz. Rev. Stat. Ann. §§ 8-361—8-367 (1989); Ark Stat. Ann. §§ 9-29-101—9-29-108 (1987 & Supp. 1987); Cal Welf. & Inst. Code § 1300 (West 1984 & Supp. 1989); Colo. Rev. Stat. §§ 24-60-701-708 (1988); Conn. Gen. Stat. Ann. §§ 17-15—77-81 (West 1988 & Supp. 1979); Del. Code Ann. Tit. 31, §§ 5203, 5221—5228 (1985); D.C. Code Ann. §§ 32-1101—32-1106 (1988); Fla. Stat. Ann. §§ 39.51—39.516 (West 1988); Ga. Code Ann. §§ 39-3-1—39-3-7 (1982); Haw. Rev. Stat. §§ 582-1—582-8 (1985 & Supp. 1988); Idaho Code §§ 16-1901—16-1910 (1979); Ill. Rev. Stat. ch. ¶¶ 2591—2597 (Smith-Hurd 1988); Iowa Code § 232.171-72 (1980 & Supp. 1989); Ind. Code Ann. §§ 31-6-10-1—31-6-4 (West 1979 & Supp. 1989); Kan. Stat. Ann. § 38-1001 (1986); Ky. (K.R.S. 208.600, 208.670); La. Rev. Stat. Ann. §§ 46:1451—46:1458 (West 1982 & Supp. 1989); Me. Rev. Stat. Ann. Tit. 34-A, §§ 9001—9016 (1988 & Supp. 1989); Md. Health-General Code Ann. §§ 6-301—6-310 (1982 & Supp. 1989); Mass. Gen. Laws Ann. ch. 119 App., §§ 1-1—1-7 (West 1969 & Supp. 1989); Mich. Comp. Laws Ann. §§ 3.701—3.706 (West 1982 & Supp. 1989); Minn. Stat. Ann. §§ 260.51—260.57 (West 1981 & Supp. 1989); Miss. Code Ann. §§ 43-25-1—43-25-17 (1981); Mo. Ann. Stat. §§ 210.570—210.600 (Vernon 1983 & Supp. 1989); Mont. Code Ann. §§ 41-6-101—41-6-106 (1989); Neb. Rev. Stat. §§ 43-1001—43-1009 (1989); Nev. Rev. Stat. §§ 214.010—214.060 (1985); N.H. Rev. Stat. Ann. § 169-A:1-9 (1983 & Supp. 1988); N.J. Stat. Ann. §§ 9.23-1—4 (West 1968 & Supp. 1989); N.M. Stat. Ann. 32-3-1—32-3-8 (1978); N.Y. Unconsul. Law §§ 1801—1806 (1979 & Supp. 1989); N.C. Gen. Stat. §§ 110-58—110-64 (1988) Repealed by Session Laws 1979, C 815 S.2, 1180 §§ 7A-684 to 7A-711 (1988); N.D. Cent. Code §§ 27-22-01—27-22-06 (1974 & Supp. 1989); Ohio Rev. Code Ann. §§ 2151.56—2156.61 (Baldwin 1989); Okla. Stat. Ann. Tit. 10, §§ 531—537 (West 1987 & Supp. 1989); Or. Rev. Stat. §§ 417.01—417.080 (1987); Pa. Stat. Ann. Tit. 62 § 731 (1968 & Supp. 1989 ; R.I. Gen. Laws §§ 14-6-1—14-6-11 (1989); S.C. Code Ann. § 27-17-10 (1976); S.D. Codified Laws Ann. §§ 26-12-1—26-12-13 (1984 & Supp. 1989); Tenn. Code Ann. § 37-801—37-

for a "parent . . . entitled to legal custody of a juvenile . . . who has run away without the consent of such parent" to petition a state court for a "requisition" securing the minor's return from the state to which he or she has fled. *See, e.g.*, D.C. Code § 32-1102, Art. IV(a) (1988). A child's freedom to leave the country is similarly conditioned.[6] Thus, passport officers may require children under 18 to obtain the consent of a parent or guardian before issuing them a United States passpost. 22 C.F.R. § 51.27 (1988).

C. Contract

The right to enter into contracts—one of the basic rights guaranteed by 42 U.S.C. § 1981—is generally either effectively denied to children (the traditional rule), or else is conditioned on their parents' consent. *See, e.g.*, Cal. Ins. Code § 10-112 (Deering 1989) (requiring parental consent for minors to enter into certain insurance contracts); 18 Del. Code § 2707 (1988) (same). *See generally*, 2 Williston, *Contracts* §§ 222-248 (3d ed. 1959 & Supp. 1989) (discussing "infants'" lack of capacity to contract); Restatement (2d) Contracts, §§ 6, 14 (1981) (same). The federal government likewise requires parental consent before allowing minors to enlist in the military or join R.O.T.C. *See* 10 U.S.C. §§ 505(a), 2104(b)(4), 2107(b)(4), 2107a(b)(4) (1982).

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806 (1984 & Supp. 1988); Texas Fam. Code Ann. §§ 25.01-09 (Vernon 1986); Utah Code Ann. §§ 55-12-1—55-12-6 (1986); Vt. Stat. Ann. Tit. 33 § 551—575 (1981 & Supp. 1988); Va. Code Ann. §§ 16.1-323—16.1-330 (1988); Wash. Rev. Code Ann. §§ 13.24.010—13.24.900 (1962 & Supp. 1989). The exceptions are North Carolina, West Virginia, Wisconsin and Wyoming.

[6] The ability to travel out of the country, while not a "right," is nonetheless a constitutionally-protected "freedom." *Haig* v. *Agee*, 453 U.S. 280, 306-307 (1981).

These restrictions, and others like them,[7] are not isolated oddities. Rather, they embody a fundamental tenet of the American legal tradition, namely that parents have natural authority over their children, which the law recognizes and reinforces.[8]

II. THIS COURT HAS LONG RECOGNIZED THAT PARENTAL AUTHORITY IS AFFIRMATIVELY PROTECTED BY THE CONSTITUTION.

Apart from *Danforth* and its progeny, these same principles of family autonomy and parental authority have been repeated time and again in the precedents of this Court. Faced with a state statute that required all children to attend public schools, this Court insisted that

> [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instructions from public teachers only. *The child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to . . . prepare him for [his] additional obligations.*

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[7] Many restrictions on children are quite mundane. *See, e.g.*, Cal. Bus. & Prof. Code § 22-706 (Deering 1989) (requiring parental consent for use by children under 18 of "tanning devices").

[8] This same vision of family and state is apparent in the debates surrounding the Thirteenth and Fourteenth Amendments. The abolitionists argued that the natural evils of slavery the law had to remedy were not limited to involuntary servitude; slavery also caused the slave's "authority and responsibility to rear his children [to be] obliterated. The members of his family might be torn from him and scattered." J. TenBroek, *The Antislavery Origins of the Fourteenth Amendment* 122 (1951); Likewise, Senator Harlan, arguing in favor of the Thirteenth Amendment, noted that one of the evils of slavery was the "abolition practically of parental relation, [thus] robbing the off-spring of the care and attention of his parents." Cong. Globe, 38th Cong., 1st Sess. 1439 (1864). Senator Wilson agreed. He thought the Thirteenth Amendment necessary, in part, because "[t]hen the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law . . . ." *Id.* at 1324.

Pierce v. *Society of Sisters*, 268 U.S. 510, 535 (1925) (emphasis added). *See also Michael H.* v. *Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality opinion) (" 'the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition' ") (citation omitted). Earlier, in *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923), the Court struck down a statute that purported to criminalize instructing children in foreign languages. The Court noted that "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education. . . ." *Id.* at 400. The statute, the Court inferred "with the power of parents to control the education of their own." *Id.* at 401.

The Court enforced the same principle, under the aegis of the Free Exercise Clause, in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). There, the Court held that a state could not require Amish children, against their parents' wishes, to attend high school. Reiterating its insistence that "[t]he child is not the mere creature of the State," *id.* at 233 (*quoting Pierce*, 268 U.S. at 535), the *Yoder* Court rejected the state's argument that it should be permitted to determine what type of education best served the Amish children. "[I]t seems clear that if the State is empowered as *parens patriae*, to 'save' a child from . . . his Amish parents . . . the State will in large measure influence, if not determine, the religious future of the child." 406 U.S. at 232. And that, the Court insisted, was well beyond the pale, since the "primary role of the parents in the upbringing of their children is now established beyond doubt. . . ." *Ibid.*

The *Yoder* Court reserved the question of how it would balance a state's right as *parens patriae* with the rights of parents and children in a hypothetical case where Amish children wished to obey a compulsory education statute against their parents' wishes. *Id.* at 231. Nevertheless, the Court warned "that such an intrusion by a State into family decisions . . . would give rise to grave questions of religious freedom comparable to those raised

here and those presented in *Pierce*. . . ." *Id.* at 231-32 (citation omitted). Six years later, in *Parham* v. *J.R.*, 442 U.S. 584 (1979), the Court went far towards resolving even that question.

In *Parham*, this Court upheld a state statute that authorized state mental institutions to admit temporarily any minor merely upon the application of that minor's parents or guardians. If, after observation, the institution found evidence of mental illness, it was authorized to admit the minor "for such period and under such conditions as may be authorized by law." 442 U.S. at 591. Any child hospitalized for more than five days, however, could always be discharged simply upon the request of his or her parents. *Ibid.* Several institutionalized children filed a class action challenging the statute as a deprivation of liberty without Due Process. They argued that "the likelihood of parental abuse" in having them committed against their will required a formal adversarial hearing. 442 U.S. at 603.

In rejecting that argument, this Court stressed once again that "our constitutional system long ago rejected any notion that a child is 'the mere creature of the State'. . . ." 42 U.S. at 602, *quoting Pierce*, 268 U.S. at 535. On the contrary, the Court emphasized that its "jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Ibid.* Thus, an independent evaluation of the child by a staff physician at the hospital was all that due process required. *Id.* at 607.[9] The Court dismissed the argument that, because of the risk that some parents would abuse their children, a more formal procedure was necessary. "The statist notion that

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[9] If the person to be committed were an adult instead of a minor, Due Process would require a full-scale adversary hearing. *See* 442 U.S. at 627 (Brennan, J., concurring and dissenting); *see* also *O'Connor* v. *Donaldson*, 442 U.S. 563, 580 (1975) (Burger, C.J., concurring); *McNeil* v. *Director Patuxent Institution*, 407 U.S. 245 (1972).

governmental power should supercede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Id.* at 603. The Court added it would not

> assume that the result in *Meyer* v. *Nebraska* . . . and *Pierce* v. *Society of Sisters* . . . would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school.

Id. at 603-04 (emphasis omitted). In short, because the child is not "the creature of the State" his parents' authority over him does not derive from the State.

Of course, as this Court has stressed, the State can and should *reinforce* parental authority. In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court upheld a statute that prohibited sales, to persons under 17, of pictures that "depict[ed] nudity" and were "harmful to minors." *Id.* at 632. The Court held that a state could properly accommodate parental authority by applying to minors a different definition of obscenity than that applicable to adults. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id.* at 639. Thus a "legislature could properly conclude that parents . . . are entitled to the support of laws designed to aid discharge of that responsibility." *Ibid.* Indeed, the Court has even upheld provisions giving parents complete discretion over what *non-obscene* sexual material may be delivered to their minor children. In *Rowan* v. *Post Office Dep't.*, 397 U.S. 728 (1970), it upheld a federal statute giving parents the right to have both their names and the names of their resident children under 19 deleted from mailing lists for material the parents judged to be "erotically arousing or sexually provocative." [10]

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[10] Concurring, Justices Brennan and Douglas would have reserved the question of the constitutionality of applying the statute to all minors under nineteen. See 397 U.S. at 741 (Brennan, J., concurring).

The above cases all stand for the proposition that parental authority should not be invaded by the state, but instead ought affirmatively to be reinforced by it. None of those cases anywhere suggests that the state must create special mechanisms to "bypass" a child's parents without notice to the parents themselves.

Quite the contrary, where this Court *has* required judicial intervention is in cases where the state seeks to *terminate* parents' rights. Thus, the state may not remove a child from his or her parents, except upon notice and hearing. *Santosky* v. *Kramer*, 455 U.S. 745 (1982). And even then the state's case must meet the "clear and convincing" standard of proof. *Ibid.* Indeed, so profound is a parent's right to raise his or her children that a state may not terminate the parental rights of even certain unwed fathers except after notice and an adversary hearing. In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the Court mandated a hearing on the fitness of a resident, but unwed, father before the state could take custody of his children following their mother's death. "It is cardinal with us," the Court repeated, "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 405 U.S. at 651, *quoting Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) (emphasis added). *See Michael H.* v. *Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality opinion) (*Stanley* line of cases rests "upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family") (footnote omitted).

III. *DANFORTH* AND *BELLOTTI II*—AS WELL AS *ROE*—ARE ABERRATIONS IN THE LAW, AND SHOULD BE REPUDIATED

Danforth and its progency are at odds with both the *Pierce* and the *Santosky* lines of cases. *Danforth* and *Bellotti II* forbid a state to accommodate parents' authority over their daughters' abortions, unless the state simultaneously provides for an *ex parte*—indeed affirmatively secret—proceeding to "bypass" the rights of the parents involved. This departure from an otherwise-settled tradition of protecting family autonomy is all the more remarkable because it was accomplished with so little fanfare.

A. *Danforth* And *Bellotti II* Are Incompatible With The *Pierce* Line Of Cases.

In *Danforth*, the Court struck down, among other things, a Missouri statute that required an adolescent to obtain her parents' consent before having an abortion. Writing for the majority, Justice Blackmun alluded only briefly to the *Pierce* line of cases and the fact that the lower court had upheld the parental consent requirement at issue as justified by the state's interest "in safeguarding the authority of the family relationship." 428 U.S. at 73. The *Danforth* majority then struck down that requirement by announcing simply that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." *Id.* at 74. Earlier in its opinion, the majority elaborated on why it thought that was so. Discussing a spousal consent requirement, which it also invalidated, the majority announced that "since the State cannot regulate or proscribe abortion during the first stage . . . the State cannot delegate authority to any particular person . . . to prevent abortion during that same period." *Id.* at 69. The majority also did not feel that allowing parents to "overrule" a decision "made by the physician and his minor patient" would "serve to strengthen the family unit." *Id.* at 75. Nor did the majority think that it would "enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict . . . ." *Ibid.*

Bellotti v. *Baird*, 443 U.S. 622 (1979) ("*Bellotti II*"),[11] followed *Danforth* and struck down a Massachusetts statute which, as construed, required a minor seeking an abortion to first attempt to get her parents' consent. Failing that, she could still have an abortion if she persuaded a state court judge that the abortion was in her best interests.

The *Bellotti II* plurality struck down those provisions because they "g[a]ve a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." 443 U.S. at 643, quoting *Danforth*, 428 U.S. at 74. The plurality then announced that a parental consent requirement would only be constitutional if the minor had the opportunity (1) to substitute a judge's idea of her best interest for that of her parents, or else, (2) to convince the judge that she was mature enough to make the decision on her own even if the judge thought it against her best interest. 443 U.S. at 643-44. The plurality stressed that "every minor must have the opportunity . . . to go directly to a court *without first consulting or notifying her parents.*" *Id.* at 647 (emphasis added). And if that court then determines "that she is mature and well enough informed to make intelligently the abortion decision on her own, the court *must authorize her to act without parental consultation* or consent." *Ibid.* (Emphasis added).

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[11] In *Bellotti* v. *Baird*, 428 U.S. 132 (1976) ("*Bellotti I*"), the Court vacated an earlier opinion of the district court, and remanded it to that court for certification of several questions of construction to the Supreme Judicial Court of Massachusetts.

Unlike the *Danforth* majority, the *Bellotti II* plurality paid somewhat more attention to the traditional protection afforded to parental authority. Nevertheless, the plurality said *Pierce* and its progeny were distinguishable because "[t]he abortion decision differs in important ways from other decisions that may be made during minority." 443 U.S. at 642. The plurality reasoned that "[a] minor not permitted to marry before the age of majority is required simply to postpone her decision . . . a pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy." *Ibid.*[12]

At bottom, therefore, *Danforth* and *Bellotti II* justified their departure from the Court's longstanding protection of family autonomy with three arguments: (1) that bearing a child is a decision with implications more profound and more urgent than those of other decisions traditionally conditioned on parental consent, (2) that the state's interest in safeguarding parental authority would not be promoted when the parents and child are "fundamentally in conflict" over the child's desire to have an abortion, and (3) that the state may not *delegate* a right of consent to parents, because the state itself has no such right to give. None of these arguments compels *Danforth*'s conclusion.

1. To be sure, bearing a child has profound consequences for an unwed adolescent. It is, however, quite debatable whether those consequences are necessarily more profound than those of other decisions subject to parental control—whether or whom to marry for example.[13] And the fact that a girl's unwed pregnancy may be a predicament more urgent than others hardly proves that a judge, who presumably has never met her before, is better capable of assisting her in facing it than her parents would be.

In short, neither the importance nor the urgency of a girl's pregnancy supports the notion that parents should be kept in ignorance of it. To the contrary, that a girl's decision to have an abortion will have so profound an impact on her, and that it may be influenced by the pressure of time and other practical considerations, only underscore the value of her parents' involvement.[14]

2. The Court suggested in Danforth that recognizing parents' right to "veto" their child's decision to have an abortion would not "enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the

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[12] *Danforth*'s reach, of course, extends beyond *Bellotti II*. *See Planned Parenthood Ass'n of Kansas City* v. *Ashcroft*, 462 U.S. 476, 490-93 (1983); *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 439-42 (1983); *H. L.* v. *Matheson*, 450 U.S. 398 (1981). *See also Zbaraz* v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S.Ct. 479 (1987) (requiring judicial bypass for parental notification statute).

[13] It is not only difficult, but probably fruitless, to guess whether a marriage or an unwed pregnancy, by itself, would have the greater impact on a child's future. For it is surely the entirety of *childhood*, an entirety not separable into discrete decisions amenable to one-at-a-time judicial proceedings, that has the greatest lifelong consequences.

> *To safeguard the right of parents* to raise their children as they see fit, free of government intrusion, except in cases of neglect and abandonment, *is to safeguard each child's need for continuity*. This preference for minimum state intervention and for leaving well enough alone is reinforced by our recognition that *law is incapable of effectively managing, except in a very gross sense, so delicate and complex a relationship* as that between parent and child.

J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests Of The Child* 13 (1973) (emphasis added). *Cf. Parham*, 442 U.S. at 504 ("Neither state officials nor federal courts are equipped to review such parental decisions").

[14] *Danforth* seems to presume that an adolescent will suffer adverse consequences only if she proceeds to bear her child. But abortion itself has adverse consequences, and the girl may live profoundly to regret that choice.

pregnancy has already fractured the family structure." 428 U.S. at 75. But there is no reason to assume that the family structure has been "fractured" whenever an adolescent wishes to conceal her pregnancy from her parents. That, no doubt, is the initial reaction of virtually every adolescent who becomes pregnant. Nor does the fact that the parents and their daughter are "in conflict" mean that the State's interest in reinforcing parental authority is somehow diminished. Parents and their children disagree all the time, and it is precisely when they do that parental authority is ordinarily exercised.

3. Most fundamentally, the *Danforth* majority misapprehended the source of parents' rights. It announced that the state cannot "give" to parents a right that it itself does not have—the right to "overrule a determination made by a physician and his minor patient." 428 U.S. at 75. Implicit in that statement is the notion that parents have only such authority as the State gives them to act in its stead. But " 'the child is not the mere creature of the state.' " *Parham*, *supra*, 442 U.S. at 602, *quoting Pierce*, 268 U.S. at 510. And since the family has its "origins entirely apart from the power of the State," parents' rights have their source "not in state law, but in intrinsic human rights. . . ." *Smith*, *supra*, 431 U.S. at 845. Thus, parents require no special legislative grace in order to "claim . . . authority in their own household to direct the rearing of their children . . . ." *Ginsberg*, *supra*, 390 U.S. at 639. Quite the contrary, "[i]t is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince*, *supra*, 321 U.S. at 166.

The statutes at issue in the present cases, like those limiting childrens' rights to marry, to travel, etc., thus do not *delegate* anything. Rather, they recognize and reinforce the natural authority of parents over their children.

Parental authority is affirmatively undermined by the requirement, which both lower courts said they found in the Constitution, of a "judicial bypass" procedure for hiding childrens' abortions from their parents. That "requirement," as well as *Danforth* and *Bellotti II*, on which it rests, should be seen as the radical departure from constitutional, common-law and legislative tradition that it is. Cf. *Bellotti II*, 443 U.S. at 657 (White, J., dissenting) ("Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.").

As Justice Harlan once noted, protected liberties are defined

> in the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

Poe v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). *Danforth* and its progeny constitute just such a departure from a long tradition of protecting family autonomy.

B. The Lower Courts' Decisions Highlight The Flaws In *Roe*.

Amicus recognizes that a majority of the Court in *Webster* v. *Reproductive Health Services*, 109 S.Ct. 3040 (1989), did not believe a full-dress reconsideration of *Roe* v. *Wade*, 410 U.S. 113 (1973), was in order until the Court was presented with a starker conflict with its

holding. *Amicus* nonetheless respectfully suggests that the lower court decisions in this case are so symptomatic of much that is wrong with *Roe* that the Court should take this opportunity to reconsider it.

The decisions of the lower courts in these cases, and *Danforth* and *Bellotti II*, which underlie them, rest on the proposition that there is a constitutional right to abortion sufficiently "unique" to justify departing from the Court's traditional approach to parents' rights. See, *e.g.*, *Hodgson*, 853 F.2d at 1456.[13] That a right to abortion is claimed to be unique in this area of constitutional law—as it is said to be in so many others—demonstrates once again that it does not fit naturally anywhere in the Constitution. Established rules must always be changed to explain its presence. It is "painfully clear that no legal rule or doctrine is safe from *ad hoc* nullification . . . where an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh* v. *American College of Obst. & Gyn.*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). The result is that *Roe*'s "scheme for constitutionalizing the regulation of abortion has had [an] institutionally debiliating effect" on the law. *Ibid.* The present case provides the Court with an example of that debilitating effect in the context of over two centuries of family law. Overruling *Danforth* and *Bellotti II* would go far toward resolving that particular anomaly, but a definitive resolution of all such anomalies can result only from overruling *Roe* itself. *Amicus* thus respectfully urges this Court to reconsider and overrule *Roe*, or, if it goes no further, to restore its traditional jurisprudence of respect for parents' rights and family autonomy by at least disavowing, if not overruling, *Danforth* and *Bellotti II*.

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[13] *Amicus* submits that there is and can be no constitutional right to abortion. See Brief of Knights of Columbus, as *Amicus Curiae*, in *Webster* v. *Reproductive Health Services*, No. 88-605.

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed, except insofar as it held a "judicial bypass" to be constitutionally required. The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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Supreme Court of the United States

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STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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JANET HODGSON, MD., *et al.*,

Petitioners and *Cross Respondents*,

v.

THE STATE OF MINNESOTA, *et al.*,

Respondents and *Cross Petitioners.*

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., AND THE AMERICAN JEWISH COMMITTEE IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS IN NOS. 88-1125, 88-1309 AND IN SUPPORT OF APPELLEES IN NO. 88-805

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
INTRODUCTION	4
ARGUMENT	7
I. COMPELLING DISCLOSURE TO HER PARENTS OF A MINOR'S PREGNANCY AND DECISION TO HAVE AN ABORTION IMPOSES A SUBSTANTIAL BURDEN ON THE MINOR'S RIGHT TO CHOOSE	7
A. Parental Notice Provisions Most Directly Affect Those Adolescents Who—For A Variety Of Compelling Reasons—Believe They Cannot Consult With Their Parents About The Abortion Decision, And Unduly Burden Their Right To Obtain An Abortion	7
B. Mandatory Parental Notification Harms Some Adolescents Who Otherwise Would Not Involve Their Parents In The Abortion Decision	9
C. Minnesota's Two-Parent Notification Requirement Places Extraordinary Burdens On Many Adolescents	12
D. An "Arbitrary And Inflexible" Waiting Period—Whether 24 Or 48 Hours—Places Greater Burdens On Adolescents Than It Does On Adults	14
II. THE SUBSTANTIAL BURDENS IMPOSED BY COMPELLED NOTIFICATION AND WAITING PERIOD PROVISIONS ARE UNCONSTITUTIONAL	15

TABLE OF CONTENTS—Continued

Page

A. The Evidence Suggests That Mandatory Parental Notification Statutes Do Not Foster Productive Intrafamily Communication 16

B. There Is No Empirical Support For The Proposition That Compelled Parental Disclosure Will Help Ensure That The Minor's Decision To Obtain An Abortion Is A Capable One 17

1. Psychological theory and research about cognitive, social and moral development strongly supports the conclusion that most adolescents are competent to make informed decisions about life situations.. 18

2. Research does not support the States' assumption that adolescents typically lack the capacity to make sound health care decisions, including decisions about abortion 21

C. There Is No Empirical Support For The Proposition That Mandatory Parental Disclosure Will Assist Minors In Dealing With The Psychological Sequelae Of Abortion..... 26

1. Adolescents who choose to abort are not less stable psychologically than other adolescents 26

2. Much of the stress pregnant adolescents experience is due to unwanted pregnancy, not to abortion 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: Page

Bellotti v. Baird, 443 U.S. 622 (1979) 5, 6, 16, 18
Carey v. Population Services Int'l, 431 U.S. 678 (1977) 16
City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 4, 6, 15
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Indiana Planned Parenthood v. Pearson, 716 F.2d 1127 (7th Cir. 1983) 15
Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) 6
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Roe v. Wade, 410 U.S. 113 (1973) 16
Stanford v. Kentucky, 109 S. Ct. 2969 (1989)..... 5
Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) 16

STATUTORY AND REGULATORY PROVISIONS:

45 C.F.R. Part 46 17
Minnesota Statutes § 144.343 (1)-(7) 4
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Page

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BRIEF FOR *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., AND THE AMERICAN JEWISH COMMITTEE IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS IN NOS. 88-1125, 88-1309 AND IN SUPPORT OF APPELLEES IN NO. 88-805

INTEREST OF *AMICI CURIAE* [1]

The American Psychological Association (APA), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 75,000 members, including the vast majority of United States psychologists holding doctoral degrees. APA's purposes are to advance psychology as a science and profession, and to promote human welfare.

The National Association of Social Workers, Inc. (NASW), a non-profit professional association with over 120,000 members, is the largest association of social workers in the United States. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession and to improving the quality of life through utilization of social work knowledge and skills.

The American Jewish Committee (AJC) is a national organization founded in 1906 for the purpose of protecting the civil and religious rights of Jews. The AJC believes that this goal can best be accomplished by helping to preserve the constitutional rights of all Americans, including access to abortion on a voluntary basis.

The parental notice and waiting period requirements at issue in these cases are premised upon the States' as-

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[1] The parties have consented to the submission of this brief. Their letters of consent are on file with the Clerk of this Court.

sumptions that, in relevant ways, minors are more psychologically vulnerable than adults, that they are immature and unable to make competent choices concerning abortion, and that such requirements will foster intrafamily communication and cooperation while not harming the adolescents affected. The validity of these legislative assumptions has been tested through empirical research conducted by social scientists. Social science research is also relevant to the arguments of the professionals, pregnant minors, and parents who challenge these requirements that the laws unduly burden minors' rights to choose whether to carry a pregnancy to term or abort. Much of the relevant research has been conducted by members of *amicus* APA; that research is presented in this brief.[2]

SUMMARY OF ARGUMENT

Most younger adolescents and many older adolescents voluntarily inform one or both parents about their pregnancies, and seek their counsel about the abortion decision. Where such consultation is voluntarily sought, adolescents are often benefitted. Mandatory parental notification laws have no effect on this group of pregnant minors, however; only those minors who otherwise would *not* involve their parents in the abortion decision are directly affected by these laws.

The empirical research suggests that such adolescents typically have good reasons not to involve their parents in the abortion decision. They may fear a hostile, even violent, reaction to the news that they have been sexually active and are now pregnant. In many cases, they may be from dysfunctional families in which one or both parents

[2] Counsel gratefully acknowledge the assistance of APA members Bruce Ambuel, Ph.D., William Gardner, Ph.D., Julian Rappaport, Ph.D., and Lenore Walker, Ed.D., and APA staff members Brian Wilcox, Ph.D., and Janet O'Keeffe, Dr. P.H., in the preparation of this brief.

may be absent, or in which child abuse, including sexual abuse, has taken place. For such reasons, or simply wishing to protect their own informational privacy—an appropriate concern for adolescent females—pregnant minors in a State with a parental notification law may delay making the abortion decision, increasing the risk to their health of undergoing the procedure or leading to *de facto* decisions to carry to term. Point I.

Mandatory parental notification may actually undermine the very state interests it is meant to advance. In those families in which the minor daughter has chosen not to inform her parents, state-mandated notification is unlikely to produce greater intrafamily understanding or communication, and may well precipitate a family crisis or exacerbate existing family problems. Moreover, there are no data to suggest that adolescents are less capable than adults of making the abortion decision on their own. Furthermore, abortion itself, as a rule, relieves the stress associated with unwanted pregnancy rather than generates distress a parent (particularly one a minor would prefer to exclude from the process) could ameliorate. Point II.

Even with a bypass procedure, which in virtually every case results in affirmation of the minor's abortion decision but which itself deters some adolescents from seeking an abortion, parental notification laws unduly burden an adolescent's right to choose. *Without* a bypass procedure, the majority of pregnant adolescents who are competent to choose for themselves, and the significant number who would be placed at increased risk by notifying one or both parents, are faced with an intolerable choice: foregoing their right to abortion and becoming adolescent parents, on the one hand, or risking their physical or psychological health by complying with the notification statute, on the other. For these reasons, the Ohio and Minnesota statutes are both unconstitutional.

INTRODUCTION

These cases concern the constitutionality of Minnesota Statutes § 144.343 (1)-(7) ("the Minnesota statute") and Ohio Amended Substitute House Bill 319 ("the Ohio statute").[3] With certain exceptions, both statutory schemes prohibit a physician from performing an abortion upon a minor unless notice has been provided to the minor's parents. The Minnesota statute requires that the minor notify *both* parents 48 hours in advance of the procedure (whether or not her parents are living together or are or ever were married); unless judicially mandated, the scheme does *not* provide a judicial bypass through which mature minors or minors whose best interests would not be served by notification may be relieved of this obligation.[4] The Ohio statute requires notification of one parent, and establishes a bypass procedure that has been found unduly burdensome by the lower courts.

With or without a judicial bypass procedure, government certainly could not compel an *adult* to notify her parents or other third parties 24 or 48 hours before undergoing an abortion, because the burdens thereby imposed on the right to choose whether to abort or carry to term would not be justified by sufficiently weighty countervailing state interests. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67-72 (1976) (*Danforth*) (spousal veto of abortion decision ruled unconstitutional); *Doe v. Bolton*, 410 U.S. 179, 201 (1973) (third party veto of abortion decision ruled unconstitutional); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 449-450 (1983) (*Akron I*) (24-hour waiting period unconstitutional). The validity of imposing such burdens on adolescents depends

[3] The key provisions of the Ohio statute are codified at Ohio Rev. Code Ann. §§ 2151, 2912.12, and 2505.073 (Page Supp. 1985).

[4] In the event a court invalidates the no-bypass provision, the statute provides that a bypass procedure will go into effect. This "backstop" provision was in effect for several years prior to the district court's final ruling.

upon whether doing so furthers state interests sufficiently to alter the balance.

This Court has recognized that "[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement." *Bellotti v. Baird*, 443 U.S. 622, 642 (1979) (*Bellotti II*). Thus, although it has asserted that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *id.* at 635, the Court has been careful to reject a State's *per se* claim that *all* adolescents are incompetent and immature. Both in the abortion context and in other cases dealing with minors, the Court has taken a more individualized approach in assessing the competency and maturity of minors to make important decisions.[5]

Specifically, this Court has never suggested that all adolescents are incompetent to decide whether to have an abortion. To the contrary, the Court has recognized that

[5] Outside the abortion context, see *Fare v. Michael C.*, 442 U.S. 707, 727 (1979) (Court applied such factors as adolescent's age, experience, education, background, and intelligence, in concluding that a 16-year old "voluntarily and knowingly waived his Fifth Amendment rights."); *id.* at 734 n.4 (Powell, J., dissenting) (recognizing that each case must be judged on its own merits, including an evaluation of the "minor's age" and "actual maturity."); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 (1982) (it violated first amendment to statutorily exclude press and public from courtroom during testimony of all victims of sexual offenses under age 18; the Court opted for case-by-case determination, including an analysis of the "minor victim's age, psychological maturity and understanding, [and] the desires of the victim."); *cf. Stanford v. Kentucky*, 109 S. Ct. 2969, 2979 (1989) (plurality opinion) (permissible for State to execute 16-year-old in cases in which adolescent has a developed moral sense).

the legal status of "minority" encompasses wide ranges of age and maturity levels. *See Danforth*, 428 U.S. at 75. It is only "immature minors" whom the Court perceives as sometimes lacking "the ability to make fully informed choices." *Bellotti II*, 443 U.S. at 640.[6] Thus, a mature minor's decision to have an abortion may not be made subject to her parent's veto. *Akron I*, 462 U.S. at 440; *Bellotti II*, 443 U.S. at 642-643; *Danforth*, 428 U.S. at 74-75. Indeed, the Court has held that "a blanket determination that all minors under the age of 15 are too immature" to make a decision related to procreation is unconstitutional. *Akron I*, 462 U.S. at 440.

The constitutionally recognized difference between immature and mature minors, *see Bellotti II*, 443 U.S. at 643-644 and n.23, is relevant in evaluating the relative benefits and burdens of a statute that requires all adolescents to consult with their parents before obtaining an abortion.[7] As discussed below, *see* Point II, *infra*, there is no empirical evidence to suggest that adolescents by about age 14 are less competent to consent to abortion than adults, or that at least some younger adolescents do not possess similar competence.[8]

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[6] *See Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-491 (1983) (the State's interest is limited to "protecting immature minors").

[7] In related contexts, the "mature minor" doctrine permits a child to consent to medical treatment if he or she is capable of appreciating its nature and consequences. *See* Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115, 117-120 (1973); *see also H.L. v. Matheson*, 450 U.S. 398, 450 n.49, 453 (1981) (Marshall, J., dissenting), and cases cited therein.

[8] Indeed, it is difficult to reconcile the idea that minors are less competent than adults to consent to abortion with the fact that state law typically allows a minor parent—whatever her age—to consent not only to the health care of her child, but to her own health care as well, including abortion. *See* J. MORRISSEY, A. HOFFMAN, and J. THROPE, CONSENT AND CONFIDENTIALITY IN THE

ARGUMENT

I. COMPELLING DISCLOSURE TO HER PARENTS OF A MINOR'S PREGNANCY AND DECISION TO HAVE AN ABORTION IMPOSES A SUBSTANTIAL BURDEN ON THE MINOR'S RIGHT TO CHOOSE.

A. Parental Notice Provisions Most Directly Affect Those Adolescents Who—For A Variety Of Compelling Reasons—Believe They Cannot Consult With Their Parents About The Abortion Decision, And Unduly Burden Their Right To Obtain An Abortion.

Most adolescents, and younger adolescents in particular, can profit from *sympathetic* guidance from a parent or other adult concerning important choices, such as decisions concerning pregnancy. Research demonstrates that most minors—especially young adolescents aged 11-14—generally do consult their parents about their pregnancies, regardless of legal mandates.

Thus, one study found that approximately three-fourths of minors aged 15 or younger voluntarily informed their parents before they obtained an abortion,[9] and 25% of this group reported that their parents suggested the abortion.[10] In States requiring that minors either inform parents or obtain their consent prior to obtaining an abor-

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HEALTH CARE OF CHILDREN AND ADOLESCENTS 43 (1986) [hereinafter MORRISSEY, HOFFMAN and THROPE].

[9] Torres, Forrest & Eismann, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 287-290 (1980) [hereinafter *Telling Parents*]. *See generally* Mnookin, Bellotti v. Baird: *A Hard Case in* IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 149, 240-241 (R. Mnookin ed. 1985) [hereinafter Mnookin]; Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 Am. J. Pub. Health 283, 284 (1982) [hereinafter *Clary*]; Rosen, *Adolescent Pregnancy Decision-making: Are Parents Important?* 15 Adolescence 44 (1980) [hereinafter Rosen].

[10] *Telling Parents*, *supra* note 9, at 290; NATIONAL ACADEMY OF SCIENCES, RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREG-

tion, young adolescents rarely use judicial bypass procedures.[11] Older adolescents who are unusually ambivalent about the abortion decision and who perceive themselves as relatively incompetent decisionmakers also are likely to voluntarily involve their parents in the decision.[12] In general, however, older adolescents fully competent to decide medical questions for themselves do not consult their parents about abortion as frequently as do young adolescents.[13]

Parental notice laws result in later, more hazardous, and more expensive abortions, and in minors carrying to term. In Minnesota, the district court found that the burdens of parental notification—even with bypass procedures available—cause "[s]ome mature minors and some minors in whose best interests it is to proceed without notifying their parents . . .to carry to term." *Hodgson v. Minnesota*, 648 F. Supp. 756, 763 (D. Minn. 1986). In Massachusetts, a smaller jurisdiction where it is less difficult to travel out-of-State to obtain an abortion, mandatory parental notification did not change the number of women who became pregnant, gave birth, or obtained abortions.[14] But the law did force approximately one-

NANCY, AND CHILDBEARING 113 (1987) [hereinafter NAS REPORT]. Only 8% of 17-year-olds who obtain abortions report that they did so at their parents' suggestion. *Telling Parents, supra* note 9, at 290.

[11] Nearly 90% of minors who use judicial bypass procedures are aged 16-17. Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-authorized Abortions*, 15 Fam. Plan. Persp. 259, 261 (1983) [hereinafter *Judging Teenagers*].

[12] *Rosen, supra* note 9, at 48.

[13] In a large, multi-state study, the proportion of minors who decided, without parental consultation, to carry to term was similar to the proportion who decided to seek an abortion without parental consultation. *Rosen, supra* note 9, at 46. *See, e.g.*, Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 Am. Soc. Rev. 385 (1963) [hereinafter Brittain].

[14] *See* Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397, 400 (1986).

third of the minors in the State seeking an abortion to leave the State and obtain the abortion in a jurisdiction without a parental consent statute. *Id.* [15]

Thus, mandatory parental notification creates substantial obstacles for many adolescents choosing to abort their pregnancies: they may have fewer, later, or more expensive abortions because they wish to avoid notifying one or both of their parents.

B. Mandatory Parental Notification Harms Some Adolescents Who Otherwise Would Not Involve Their Parents In The Abortion Decision.

Both courts and social scientists have identified the reasons mandatory notification has these deleterious effects. On the basis of a detailed record, the *Hodgson* court found that after five years of operation the compelled notice required by the Minnesota statute almost always had a negative impact, frequently harming the child's welfare. 648 F. Supp. at 764, 768-769. The court found as a matter of fact that compelled two-parent notification in families with a non-custodial or absent parent was typically disruptive, and led to violence and abuse in dysfunctional families. *Id.* at 769.[16]

Data support the district court's findings. One study of parental reaction to adolescent daughters' pregnancies showed that such an announcement typically evoked an initial response of anger and disappointment, and triggered a crisis in the family.[17] And anger is not the only response an adolescent need fear. A major government study has estimated that in 1986, more than one million

[15] Approximately twice as many women chose to leave the State to obtain their abortions as chose to utilize the judicial bypass. *Id.* at 398, 399.

[16] Appendix to Petition for a Writ of Certiorari in *Hodgson v. Minnesota*, No. 88-1125, filed January 4, 1989 at 141a (testimony of Dr. Lenore Walker).

[17] *See, e.g.*, Osofsky & Osofsky, *Teenage Pregnancy: Psychosocial Considerations*, 21 Clinical Obstetrics & Gynecology 1161 (1978).

children and adolescents nationwide had already experienced demonstrable harm as a result of abuse or neglect.[18]

In light of the relatively widespread nature of intrafamily abuse, it is not surprising that in about one-third of cases in which adolescents do not inform their parents about their pregnancy and planned abortion, they are motivated by fear of physical punishment or some other severe reaction.[19] Research on domestic violence has demonstrated that pregnancy does not deter and may even precipitate physical attacks by batterers.[20] Adolescents may particularly fear telling their parents about a pregnancy if it is the result of sexual abuse. Research indicates that such abuse—both extrafamilial and intrafamilial—is disturbingly common.[21] Compelling parental in-

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[18] NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T HEALTH AND HUMAN SERVICES, STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988 at xx (1989) [hereinafter HHS STUDY]. This figure is considered to be a minimum estimate because the incidence of abuse is substantially underreported. *Id.* at 7-2. *See generally* Gelles & Strauss, *Behind Closed Doors—Violence in the American Family*, 35(2) J. Soc. Issues 15, 24 (1979) [hereinafter Gelles & Strauss].

[19] Clary, *supra* note 9, at 284. Even if an adolescent misjudged her parents' response, the perception may be more important than the reality in causing adolescents to delay seeking medical assistance or making a decision whether to abort.

[20] Gelles, *Violence and Pregnancy: A Note On The Extent Of The Problem And Needed Services*, 24 Fam. Coordinator 81 (1975).

[21] *See generally* D. FINKELHOR & ASSOC., A SOURCEBOOK ON CHILD SEXUAL ABUSE (1986); HHS STUDY, *supra* note 18, at xx-xxi. *See also* Moore, Nord & Peterson, *Nonvoluntary Sexual Activity Among Adolescents*, 21 Fam. Plan. Persp. 110, 111 (1989) (data from the 1987 National Survey of Children indicate that 9 percent of 17-year olds, 7.5 percent of 16-year olds, 6.3 percent of 15-year olds and 5.8 percent of girls 14 and under have experienced nonvoluntary sexual intercourse; adolescent girls with parents who abuse alcohol and drugs were two to three times more likely to have experienced nonvoluntary sexual intercourse; sixty-eight percent of white females with three or more risk factors had been sexually abused before or during adolescence); Russell, *The Incidence and*

volvement in such instances, particularly if the pregnancy is the result of incest, is likely to intensify or exacerbate an already traumatic and emotionally volatile situation.

Moreover, in many cases involving older adolescents, compelled disclosure will burden a young woman's interest in informational privacy.[22] The protection of privacy and the maintenance of control over personal information in sexual matters is an especially vital concern of adolescent females.[23] As the *Hodgson* district court found, based upon presentation of empirical research and clinical experience, assertion of privacy is a mark of maturity and psychological adaptation among adolescents. *Hodgson v. Minnesota*, 648 F.Supp. at 767, 775. Depriving an adolescent female of autonomy in making the abortion decision often imposes far more stress on her than does making the decision itself or undergoing the medical procedure. *Id.* at 763-764.

Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children in HANDBOOK ON SEXUAL ABUSE OF CHILDREN 19, 25 (L. Walker, ed. 1987) (research on a probability sample of 930 women found that 16 percent reported at least one experience of intrafamilial sexual abuse before the age of 18 and 12 percent had been sexually abused by a relative before 14 years of age; 31 percent reported at least one experience of sexual abuse by a non-relative before the age of 18).

[22] This interest is partially responsible for the rarity of parent-daughter discussions about sexual matters. Adolescents' discomfort in initiating or participating in such discussions, *see* Dubbe, *What Parents Are Not Told May Hurt: A Study Of Communication Between Teenagers And Parents*, 14 Fam. Life Coordinator 96, 97, 98 (1965); *see generally* Fox & Inazu, *Mother-Daughter Communication About Sex*, 29 Fam. Rel. 347 (1980), reflects, in part, a developmentally appropriate concern with privacy.

[23] *See* Melton, *Decision Making by Children: Psychological Risks and Benefits in* CHILDREN'S COMPETENCE TO CONSENT 21 (G. Melton, G. Koocher & M. Saks eds. 1983); Parke & Swain, *Children's Privacy in the Home: Developmental, Ecological, and Child-Rearing Determinants*, 11 ENV'T & BEHAV. 87 (1979); Wolfe, *Childhood and Privacy in* CHILDREN AND ENV'T 175 (I. Altman & J. Wohlwill eds. 1978); Laufer & Wolfe, *Privacy as a Concept and a Social Issue*, 33(3) J. Soc. Issues 22 (1977).

Many States recognize the need to respect minors' privacy—and their competence—in making sensitive and important decisions concerning their health and future. Most States presume a minor competent to consent without parental notification to treatment for sexually transmitted diseases, mental health treatment, and medical treatment related to pregnancy, and recognize the crucial role confidentiality plays in permitting minors to obtain access to vitally necessary health services.[24] Minnesota singles out abortion as requiring parental notification. Minn. Stat. § 144.343(1). Additionally, States typically allow minors, whatever their age, to consent to their own health care once they become parents.[25]

Thus, parental consent laws risk causing harm to many of the adolescents they are intended to protect. For a variety of legitimate reasons—fear of domestic physical or psychological violence or appropriate concern for personal privacy—many adolescents will delay or avoid their decision to abort or carry to term, or go out of State to obtain the abortion if feasible, rather than comply with the notification requirement.

C. Minnesota's Two-Parent Notification Requirement Places Extraordinary Burdens On Many Adolescents.

Minnesota's requirement that *both* parents be notified is directed at those adolescents who would voluntarily consult one parent, but would not voluntarily speak with both parents before obtaining an abortion.[26] It imposes often insurmountable barriers. Due to high levels of marital dissolution and the high incidence of out-of-wedlock childbearing, the great majority of adolescents have lived at least for a time in single parent families. It is estimated

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[24] *See generally* MORRISSEY, HOFFMAN & THROPE, *supra* note 8.

[25] *Id.* at 43.

[26] In many cases, *two* parent notification may override the judgment, not only of the adolescent, but of one of her parents, that one parent should not be notified.

that by age 17, 70 percent of white children born in 1980 will have spent at least some time with only one parent, and 94 percent of black children will have lived in one-parent homes.[27] Moreover, data obtained from the 1981 Current Population Report indicated that in 1980, 2.3 million or 3.7 percent of all unmarried noninstitutionalized children under the age of 18 were not living with either of their parents.[28]

Data from a nationally representative sample of children aged 11-16 indicates that when an adolescent lives apart from one of her parents, she frequently has little contact with the absent parent.[29] Over one-third of the children living with their mothers in one-parent homes have had no contact at all with their absent father during the previous five years, or are unaware if their father is alive or dead.[30] Over half have had no contact in the previous year.[31] And the little contact that occurs tends to be purely social, not involving counseling about life decisions.[32] "Coparenting among formerly married couples is more of a myth than a reality in all but a tiny fraction of families. [Nonresident parents] typically give up decision-making authority and exercise little direct in-

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[27] Hofferth, *Updating Children's Life Course*, 47 J. Marriage and Fam. 93, 93 (1985).

[28] Montemayor and Leigh, *Parent-Absent Children: A Demographic Analysis of Children and Adolescents Living Apart from their Parents*, 31 Fam. Relations 567, 567 (1982).

[29] Furstenberg, Nord, Peterson and Zill, *The Life Course of Children of Divorce*, 48 Am. Sociological Rev. 656, 663 (1983).

[30] *Id.*

[31] *Id. See also* Seltzer & Bianchi, *Children's Contact with Absent Parents*, 50 J. Marriage and Fam. 663 (1988).

[32] Furstenberg & Nord, *Parenting Apart: Patterns of Childrearing After Marital Disruption*, 47 J. Marriage and Fam. 893, 902 (1985) [hereinafter Furstenberg & Nord]. Lack of involvement by the non-custodial parent is also evidenced by the small proportion of absent fathers who contribute to their children's support. *See* U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES, CHILD SUPPORT AND ALIMONY: 1985 (Series P-23, No. 154, 1989) at 1.

fluence over their children's upbringing." [33] Thus, in many instances, mandating parental disclosure would force the involvement of a disinterested parent in potentially disruptive ways. Most troubling is the potential for serious harm to both the mother and the adolescent if an absent father with a history of abusive behavior is notified.[34] In such families, mandatory two-parent notification may be particularly damaging.

Moreover, even in two-parent homes, it is very common for fathers to be completely uninvolved in providing information or giving advice about sexual matters to their daughters. Research has shown that the limited sex education that occurs in the home is usually done by the mother.[35] Moreover, the district court in *Hodgson* found that in many cases compelled two-parent notification had inhibited rather than advanced voluntarily initiated intrafamily communication. 648 F. Supp. at 777-778.[36] Thus, there is no reason to believe that requiring adolescents who would not otherwise do so to speak with their fathers about their abortion decision would promote any kind of beneficial family interaction, and reason in many cases to fear that harm may ensue.

D. An "Arbitrary And Inflexible" Waiting Period—Whether 24 Or 48 Hours—Places Greater Burdens On Adolescents Than It Does On Adults.

The 24-hour and 48-hour waiting periods here at issue impose even greater burdens on adolescents' right to obtain an abortion than do similar provisions this Court has struck down as applied to all women. In *Akron I*, this Court concluded that the State "failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible [24-hour] waiting period," and held that such a waiting period was unconstitutional. 462 U.S. at 450. The Court noted that the waiting period increased the cost and risk of obtaining an abortion, *inter alia*, because scheduling difficulties effectively delayed the planned abortion more than 24 hours. *Id.*

Such burdens on the right to obtain an abortion are particularly onerous for adolescents.[37] Adolescents already obtain abortions later in pregnancy than older women, and the risk of complications increases with each week of delay.[38] Thus, the additional state-imposed delay needlessly compounds the health risks adolescents already encounter.

II. THE SUBSTANTIAL BURDENS IMPOSED BY COMPELLED NOTIFICATION AND WAITING PERIOD PROVISIONS ARE UNCONSTITUTIONAL.

This Court has asserted, as a guiding principle, that:

> [W]hen a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.

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[33] Furstenberg & Nord, *supra* note 32, at 903.

[34] Domestic violence—both wife battering and child abuse—is not uncommon in American homes. Gelles & Strauss, *supra* note 18. In Minnesota alone, there are an average of 31,200 assaults on women by their partners each year. DEPT. OF CORRECTIONS, MINNESOTA PROGRAMS FOR BATTERED WOMEN (January 1985).

[35] Rozema, *Defensive Communication Climate as a Barrier to Sex Education in the Home*, 35 Fam. Relations 533 (1986).

[36] The court found that some adolescents were dissuaded from contacting one parent because only the consent of both parents would eliminate the need for judicial proceedings.

[37] *See Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1143 (7th Cir. 1983) ("the same objections to the waiting period for adults listed in *City of Akron* apply to waiting periods for minors"); *Hodgson*, 648 F. Supp. at 765 ("[t]his statutorily imposed delay frequently is compounded by scheduling factors such as clinic hours, transportation requirements, weather, a minor's school and work commitments").

[38] *See* Russo, *Adolescent Abortion: The Epidemiological Context in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 40, 55-67 (G. Melton ed. 1986) [hereinafter Russo]; NAS REPORT, *supra* note 10, at 114, 277.

Carey v. Population Services Int'l, 431 U.S. 678, 696 (1977). The right to secure an abortion is fundamental, *Roe v. Wade*, 410 U.S. 113 (1973), protected at a minimum against imposition of "undue burdens," *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3063 (1989) (O'Connor, J., concurring). There can be no serious question, for the reasons set forth above, that the statutes at issue impose a substantial burden on all minors that would be unconstitutional if imposed on adults. *See* p. 4, *supra*.

The States have asserted three general purposes in defense of mandatory notification statutes, which in other contexts have been recognized by this Court:[39] promoting a family role in the child-rearing process, Cross-Petition for Writ of Certiorari in No. 88-1309 at 3; assuring that the decision to abort is an informed one, *id.*; and promoting the adolescent's emotional stability, particularly as it relates to "the minor's psychological sequelae that may attend the abortion procedure," *Hodgson*, 648 F. Supp. at 766. In *Hodgson*, after hearing evidence about the manner in which the Minnesota law operated for five years, the trial court found as a matter of fact that none of these interests was promoted. The scientific evidence supports the district court's findings.

A. The Evidence Suggests That Mandatory Parental Notification Statutes Do Not Foster Productive Intrafamily Communication.

As demonstrated in Point I, *supra*, the scientific and record evidence suggests that mandatory parental notification statutes are actually *destructive* of the family role in child-rearing. The productive communication patterns of a normal family that these laws purport to promote are based upon trust and the voluntary desire to

[39] *See Danforth*, 428 U.S. at 75 (family role in decisionmaking); *Bellotti II*, 443 U.S. at 635 (decisionmaking competence); *H.L. v. Matheson*, 450 U.S. 398, 412 (1980) (psychological consequences of abortion).

share or to know; compelled or coerced communication lacks these qualities.[40]

B. There Is No Empirical Support For The Proposition That Compelled Parental Disclosure Will Help Ensure That The Minor's Decision To Obtain An Abortion Is A Capable One.

These burdensome regulations also might be defended as needed to ensure that the pregnant woman is making an informed choice. Whether the laws' burdens are justified in light of this purpose should turn in substantial part on whether the scientific evidence supports the State's assumptions about the competence of minors to make decisions about pregnancy.

The Court has yet to define precisely what the capacity to make informed choices means.[41] It has, however, never relied upon a definition of capacity to consent that focuses on the choice made,[42] focusing instead on the individual's cognitive capacity to make the decision to abort, *i.e.*, the ability to understand the nature of the procedure, its risks, benefits, consequences, and possible alternatives. Perhaps the most complete statement of this Court's position on competency appears in *Danforth*, 428 U.S. at 104 (Stevens, J., concurring in part and dissenting in part): "The Court assumes that parental consent

[40] *See generally* D. CURRAN, TRAITS OF A HEALTHY FAMILY (1983).

[41] *But see* 45 C.F.R. Part 46 (DHHS rules regarding consent to biomedical and behavioral research including consent to research with children); Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 Child Dev. 1589 (1982) [hereinafter Weithorn & Campbell]; Bersoff, *Children as Research Subjects: Problems of Competency and Consent in* THE RIGHTS OF CHILDREN 186 (J. Henning ed. 1982).

[42] Of approximately 1.1 million teenage pregnancies annually, about 40% are terminated by abortion. By any objective standard the decision to abort is one that a reasonable person, including a reasonable adolescent, could make. NAS REPORT, *supra* note 10, at 1, 15, 261; Alan Guttmacher Institute, *School Sex Education in Policy and Practice*, 3 Issues in Brief 1 (1983) [hereinafter AGI].

is an appropriate requirement if the minor is not capable of understanding the procedure and of appreciating its consequences and those of available alternatives." [43] Both psychological theory and significant and substantial evidence developed by social scientists bear on the empirical question whether adolescents possess the requisite capacity to consent under this formulation.

1. ***Psychological theory and research about cognitive, social and moral development strongly supports the conclusion that most adolescents are competent to make informed decisions about important life situations.***

Developmental psychologists [44] have built a rich body of research examining adolescents' capacities for understanding, reasoning, solving problems and making decisions, especially in comparison to the same capacities in adults. Research consistently supports the conclusion that there is a predictable development during late childhood and early adolescence of the capacity to think rationally about increasingly complex problems and decisions. Although there are several competing theories of cognitive development, these theories each recognize that a revolution in rationality occurs during early adolescence.

The specific reasoning abilities that develop during early adolescence are closely akin to the capacity to consent, and include the capacity to reason abstractly about

[43] *See also Bellotti II*, 443 U.S. at 640 ("ability to . . . take account of both immediate and long-range consequences"). The concern that a minor have adequate *information* about her decision, as opposed to the capacity to choose based upon such information, *see Bellotti II*, 443 U.S. at 643, is less a component of the adolescent's competency than of the physician's legal and ethical duty to provide all material information to the patient. *See* Wadlington, *Consent to Medical Care for Minors: The Legal Framework in* CHILDREN'S COMPETENCE TO CONSENT 57 (G. Melton, G. Koocher & M. Saks eds. 1983).

[44] Developmental psychologists are scientists who study cognitive, perceptual, personality, social and emotional development along the life span of individuals.

hypothetical situations; the capacity to reason about multiple alternatives and consequences; the capacity to consider more variables and combine variables in more complex ways; and the capacity for systematic, exhaustive use of information.[45]

Competent decisionmaking is also dependent on social and personality development including the development of personal values, identity, autonomy, and the ability to resolve social dilemmas. Research in social and personality development contradicts the stereotype of adolescence as a period when young people are paralyzed by a struggle for identity, social confusion and rebellion against parents. In fact, by middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas,[46] understanding social rules and laws,[47] reasoning about interpersonal relationships [48] and interpersonal problems,[49] and reasoning about

[45] For a discussion of these changes from three theoretical perspectives, see B. INHELDER & J. PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE (1958); Braine & Rumain, *Logical Reasoning in* HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT 263 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983); Sternberg & Powell, *The Development of Intelligence in* HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT 341 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983).

[46] Rest, *Morality in* HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT 556 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983); Kohlberg, *Moral Stages and Mortalization: The Cognitive-Developmental Approach in* MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES (Lickona ed. 1976); Kohlberg & Hersch, *Moral Development: A Review of the Theory*, 16 Theory into Practice 53 (1977).

[47] Tapp & Kohlberg, *Developing Senses of Law and Legal Justice in* LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 89 (J. Tapp. & F. Levine, eds. 1977).

[48] R. SELMAN, THE GROWTH OF INTERPERSONAL UNDERSTANDING: DEVELOPMENTAL AND CLINICAL STUDIES (1980).

[49] Marsh, Serafica & Barenboim, *Effect of Perspective-taking Training on Interpersonal Problem Solving*, 51 Child Development

custody preference during parental divorce.[50] By middle adolescence most young people develop an adult-like identity and understanding of self.[51] Furthermore, the majority of adolescents do not repudiate parental values, but incorporate them, during their search for autonomy.[52] Thus, by age 14 most adolescents have developed adult-like intellectual and social capacities including specific abilities outlined in the law as necessary for understanding treatment alternatives, considering risks and benefits, and giving legally competent consent.

There is not as much information about the practical decisionmaking competence of younger adolescents—those aged 11 to 13.[53] Research has indicated that there is considerable variability in cognitive development and decisionmaking competence among adolescents, and there are some 11-to-13-year-olds who possess adult-like capabilities in these areas.[54] It is instructive that young adolescents are deemed capable in many state statutes of giving informed consent to various medical procedures, including mental health services, treatment for sexually transmitted diseases, and surgery related to childbirth. Should they have a child, young adolescents are typically deemed competent to make health care decisions both for themselves

140 (1980); Marsh, Serafica & Barenboim, *Interrelationships Among Perspective Taking, Interpersonal Problem Solving, and Interpersonal Functioning*, 138 J. Genetic Psychology 37 (1981).

[50] Greenberg, An Empirical Determination of the Competence of Children to Participate in Child Custody Decision-Making (1983) (Dissertation Abstracts Int'l).

[51] Harter, *Developmental Perspectives On the Self System in* HANDBOOK OF CHILD PSYCHOLOGY, VOLUME IV: SOCIALIZATION, PERSONALITY & SOCIAL DEVELOPMENT 275 (Heatherington, ed. 1983).

[52] *See* Conger, *A World They Never Knew: The Family and Social Change in* TWELVE TO SIXTEEN 197 (J. Kagan & R. Coles eds. 1972); Brittain, *supra* note 13.

[53] Because few young adolescents become pregnant, it is difficult for researchers to obtain a sample large enough to study the abortion decisionmaking competence of this group.

[54] See sources cited *supra* notes 46-51.

and their child.[55] At a minimum, therefore, a case-by-case approach to assessing decisionmaking competence among young adolescents is essential.

For all the reasons set forth in this section, the assumption that adolescents as a group are less able than adults to understand, reason and make decisions about intellectual and social dilemmas is not supported by contemporary psychological theory and research.

2. *Research does not support the States' assumption that adolescents typically lack the capacity to make sound health care decisions, including decisions about abortion.*

There has been substantial empirical research testing adolescents' decisionmaking performance when faced with various types of practical problems involving treatment and non-treatment decisions. Some of these studies specifically compare the performance of adolescents to that of adults in making such decisions.[56] The evidence does not support the assumption underlying notification laws that adolescents lack an adult's capacity to understand and reason about problems and decisions, including medical and psychological treatment alternatives, or the ability to comprehend and consider risks and benefits regarding treatment alternatives.[57]

[55] MORRISSEY, HOFFMAN & THROPE, *supra* note 8, at 43.

[56] Studies comparing adolescents and adults include Belter & Grisso, *Children's Recogniton of Rights Violations in Counseling*, 15 Prof. Psychology 899 (1984) [hereinafter Belter & Grisso]; Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Calif. L. Rev. 1134 (1980) [hereinafter Grisso]; Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 Am. J. Orthopsychiatry 446 (1980); Weithorn & Campbell, *supra* note 41; Ambuel, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion: An Empirical Study and Quantitative Model of Social Policy (1989) (Dissertation Abstracts Int'l) [hereinafter Ambuel].

[57] *See, e.g.*, Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 1 (G. Melton ed. 1986) [hereinafter Melton & Pliner]; Weithorn,

The two most directly relevant studies compared abortion decisionmaking by adolescents and adults at the time they received pregnancy tests in actual treatment settings. Results of both are consistent with the research and theory reviewed above showing that "adolescents are as able to conceptualize and reason about treatment alternatives as adults are." [58] In one study,[59] 16 unmarried adolescents, aged 13-17, and 26 unmarried adult women, aged 18-25, were asked to consider their options for responding to their own pregnancies at the time of their pregnancy tests. Standardized questions were used to determine their knowledge of pregnancy-related laws, sources of advice they had received or expected to seek, the range of factors one could consider in making choices about one's pregnancy, and the reasons for their own

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Children's Capacities in Legal Contexts in CHILDREN, MENTAL HEALTH, AND THE LAW 25 (N. Reppucci & Assoc. eds. 1984); Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. Fam. L. 445 (1984); Grodin & Alpert, *Informed Consent and Pediatric Care in* CHILDREN'S COMPETENCE TO CONSENT 93 (G. Melton, G. Koocher & M. Saks eds. 1983); Weithorn, *Developmental Factors and Competence to Make Informed Treatment Decisions in* LEGAL REFORMS AFFECTING CHILD AND YOUTH SERVICES 85 (G. Melton ed. 1982); Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. Davis L. Rev. 255 (1979); Ferguson, *The Competence and Freedom of Children to Make Choices Regarding Participation in Research: A Statement*, 34 J. Soc. Issues 114 (1978); Grisso & Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 Prof. Psychology 412 (1978); Schowalter, *The Minor's Role in Consent for Mental Health Treatment*, 17 J. Am. Acad. Child Psychiatry 505 (1978).

Not all older adolescents and not all adults reach the highest levels of competence to consent to treatment, *see* Roth, Meisel, & Lidz, *Tests of Competence to Consent to Treatment*, 135 Am. J. Psychiatry 279 (1977), but there is no substantial support for the proposition that cognitive abilities of the two groups are different.

[58] APA Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion, Psychological and Legal Issues*, 42 Am. Psychologist 73, 73 (1987) [hereinafter Interdivisional Committee Study].

[59] Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 Am. J. Orthopsychiatry 446 (1980).

choices. The study revealed no differences between the unmarried minors and adults in the decisions they made or in their knowledge of pregnancy-related laws. Further, when asked to describe factors that could affect one's choice of abortion or motherhood, minors differed very little from adults in the frequency with which they mentioned various considerations and consequences. There were no differences on such factors as the positive emotions associated with mothering, financial concerns, the effect of given choices on one's goals or present lifestyle, or social stigma.

The second highly relevant study examined pregnancy decisionmaking in 15 adolescents aged 14-15, 19 adolescents aged 16-17, and 40 adults aged 18-21, at the time they sought a pregnancy test at a women's health clinic.[60] The sample was representative of various economic, racial and religious backgrounds. Each person participated in an extensive decisionmaking interview conducted by a counselor, which was audio-taped and later rated by trained, independent raters. The four measures used to evaluate decisionmaking competence were suggested by this Court's understanding of competency,[61] and focused on the individual's cognitive and volitional capacity: consideration of risks and benefits including immediate and future consequences; quality and clarity of reasoning; number and types of factors considered; and volition, *i.e.*, making a decision without being coerced by or acquiescing to others. Results showed that minors aged 14 to 17, who considered abortion as an option, equaled adults in all

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[60] Ambuel, *supra* note 56; Ambuel & Rappaport, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion (1989) (Paper Presented at American Psychological Association Convention, available from *amicus* counsel of record).

[61] *See Danforth*, 428 U.S. at 104 (Stevens, J., concurring in part and dissenting in part). *See also* Wadlington, *Consent to Medical Care for Minors: The Legal Framework in* CHILDREN'S COMPETENCE TO CONSENT 57 (G.P. Melton, G. Koocher & M. Saks eds. 1983).

four measures of competence. Taken together these two studies suggest that minors equal adults "in their 'competence' to imagine the various ramifications of the pregnancy decision," [62] and their capacity to make a reasoned choice when facing unplanned pregnancy.[63]

Indeed, the National Academy of Sciences, in a major review of the research, observed that almost all minors who employ judicial bypass procedures to avoid parental involvement are held to be mature, and their decisions to have an abortion are held to be in their best interests.[64] This evidence strongly suggests that many adolescents who choose not to consult with their parents are competent to make the abortion decision.[65]

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[62] *Id. See* Lewis, *Minors' Competence to Consent to Abortion*, 42 Am. Psychologist 84 (1987).

[63] In another relevant study, 14-year old minors and adults were presented with four vignettes about individuals suffering from particular medical or psychological disorders. They were given detailed information about the nature, purpose, risks and benefits of the alternative treatments, and were asked to choose among them. The participants were then asked a series of standardized questions about their decisions. In most instances, the responses showed no difference between the adults and the 14-year-olds on any of the scales of competency used in the study—factual understanding, inferential understanding (appreciation), reasoning, choice of reasonable option, and evidence of choice. Weithorn & Campbell, *supra* note 41. For a confirming study, *see* Belter & Grisso, *supra* note 56; Grisso, *supra* note 56.

[64] *See* NAS REPORT, *supra* note 10, at 194-195. For supporting research *see* Melton & Pliner, *supra* note 57, at 26; Mnookin, *supra* note 9; *Judging Teenagers*, *supra* note 11, at 259-267; *see also Hodgson v. Minnesota*, 648 F. Supp. at 765, 766-67.

[65] Indeed, it can be seriously questioned whether a notification statute with a bypass procedure in practice does more than expend judicial resources. At worst, it is a source of anxiety, medically harmful delay, and family conflict. Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 Am. Psychologist 79, 82 (1987). That so many minors, despite its burdens, choose to undergo a bypass process and succeed in demonstrating their competence and best interests to a judge, dramatizes the fact that *without* a bypass, the burdens of mandatory parental notification would be intolerable.

Thus, empirical studies of treatment and abortion decisionmaking have found no differences between adolescents aged 14-18 and adults in factors related to legal competence.[66] There is therefore no scientific foundation for the States' assumption that adolescents' decisions to have an abortion are generally less thoughtful and informed than adults' decisions.

Moreover, related research indicates that attempts by the State to compel parental consultation in minors' abortion decisions are unlikely to result in better reasoned decisions.[67] One study found that although adolescents who were able to discuss their unintended pregnancy with two or three people they considered sympathetic and supportive decided upon a course of action faster than women with less social support, no benefit accrued from discussing the pregnancy with parents or others considered unsympathetic.[68] Research has consistently shown

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[66] Studies have recognized differences between adults and adolescents regarding the decision to have an abortion, but those differences do not reflect upon the relative competence of adolescents (or adults) to make the abortion decision. Instead, the differences appear to be related to minors' and adults' differing social situations. For example, adolescents tend to see their decision as more influenced by consideration of its impact on others, and more frequently involve a parent in the decision. They also tend to take more time to reach a decision, making the added delays caused by notification and bypass procedures even more potentially harmful to the adolescents' health than similar requirements would be to adults' health. *See* Interdivisional Committee Study, *supra* note 58, at 73, and studies cited therein.

[67] Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?* 62 Neb. L. Rev. 455, 470-471 (1983); Zabin & Hirsch, Effects of Abortion and Childbearing on Education and the Psychological Status of Black Urban Adolescents 16 (1988) (Paper presented at Annual Meeting of American Public Health Association, available upon request from counsel of record). *See* Rothenberg, *Communication About Sex and Birth Control Between Mothers and Their Adolescent Children*, 3 Population and Env't 35 (1980).

[68] Ashton, *Pattern of Discussion and Decision-making Amongst Abortion Patients*, 12 J. Biosocial Sci. 247 (1980).

that parents are seldom significant sources of sex education for their children.[69] The findings of many studies suggest that sex is an issue of conflict that rarely elicits open and honest communication between parents and adolescents, and that a general lack of rapport between parents and adolescents contributes to their difficulty in communicating about sex.[70] In many instances, therefore, compelled parental involvement in the abortion decision is not likely to be constructive.

C. There Is No Empirical Support For The Proposition That Mandatory Parental Disclosure Will Assist Minors In Dealing With The Psychological Sequelae Of Abortion.

The scientific evidence also fails to lend any support to the States' assumptions that the psychological sequelae of abortion are more severe for an adolescent than for an adult and that forced parental involvement is therefore necessary to ensure the continuing psychological well-being of the adolescent.

1. *Adolescents who choose to abort are not less stable psychologically than other adolescents.*

The increasingly early biological maturation of adolescents is well documented.[71] A majority of individuals become sexually active during adolescence.[72] Indeed, 40% of today's 20-year-old women have had at least one

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[69] Rozema, *supra* note 35, at 532; Bennett & Dickinson, *Student-parent Involvement in sex, birth control and venereal disease education*, 16 J. Sex Research 114, 115 (1980).

[70] *Id.* Parents, not surprisingly, generally disapprove of their children's premarital sexual relations. Marsman & Herold, *Attitudes Toward Sex Education and Values in Sex Education*, 35 Fam. Relations 357 (1986).

[71] Rauh, Johnson, & Burket, *The Reproductive Adolescent*, 20 Pediatric Clinics of North America 1005 (1973).

[72] Marecek, *Counseling Adolescents with Problem Pregnancies*, 42 Am. Psychologist 89 (1987).

pregnancy during their teen years.[73] And there is no empirical support for the supposition that adolescents seeking abortions are drawn from an especially psychologically or emotionally vulnerable subpopulation. Unmarried adolescents who seek abortions are similar in psychological makeup to other adolescents.[74] Moreover, compared to unmarried adolescents who choose to carry to term, those seeking abortions are likely to be somewhat advantaged in terms of social class status, family background and academic achievement.[75] Adolescents who seek abortions, compared to those who choose motherhood, are characterized by a number of traits associated with positive mental health and superior psychological maturity—greater independence, higher academic motivation and aspiration, and more feelings of competence and optimism.[76] Thus, not only is it unproven that as a group adolescents who choose abortions are at special psychological risk, but the opposite is actually shown to be the case.

2. *Much of the stress pregnant adolescents experience is due to unwanted pregnancy, not to abortion.*

More generally, the evidence does not support this Court's assertion that there are "potentially grave emotional and psychological consequences of the decision to abort." *H.L. v. Matheson*, 450 U.S. 398, 412-413 (1980). Three major reviews of the psychological and psychiatric research literature all confirm that for most women who undergo abortion, there are no long-term negative emotional effects.[77]

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[73] Russo, *supra* note 38, at 63.

[74] Olson, *Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women*, 50 Am. J. Orthopsychiatry 432, 436 (1980) [hereinafter Olson].

[75] *Id.*

[76] *Id.*

[77] Marecek, *Consequences of Adolescent Childbearing and Abortion in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 96

When women experience regret, depression, or guilt following an abortion, such feelings are mild and diminish rapidly.[78] When serious problems do occur, they are most likely to occur among women with prior histories of psychiatric problems.[79] With respect to adolescents, abortion "is neither psychologically harmful nor in other ways damaging to the patient." [80] "Very few teenagers have severe psychiatric complications after induced abortion." [81]

Abortion not only carries a low risk of negative psychological consequences for adolescents, but the psychological sequelae of abortion for adolescents are usually positive, with significant diminution of anxiety and increased feelings of well-being. "The predominant response following abortion is generally relief." [82] Studies of the mental health status of pregnant women before and after abortion show significant reductions in the symptoms of stress,

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(G. Melton ed. 1986) [hereinafter *Consequences*]; Adler & Dolcini, *Psychological Issues in Abortions for Adolescents in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 74 (G. Melton ed. 1986) [hereinafter Adler & Dolcini]; Shusterman, *The Psychological Factors of the Abortion Experience: A Critical Review*, 1 Psychology of Women Q. 79 (1976) [hereinafter *Shusterman*]. *See generally* Brief for *Amicus Curiae* American Psychological Association in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

[78] Adler & Dolcini, *supra* note 77, at 84.

[79] *Id. See* NAS REPORT, *supra* note 10, at 195.

[80] Olson, *supra* note 74, at 440.

[81] Cates, *Adolescent Abortions in the United States*, 1 J. Adolescent Health Care 18 (1980); *see* C. CHILMAN (ed.), ADOLESCENT SEXUALITY IN A CHANGING AMERICAN SOCIETY (NIH Pub. No. 79-1426) (1978); Bracken, Hackamovitch & Grossman, *The Decision to Abort and Psychological Sequelae*, 15 J. Nervous and Mental Disorders 155 (1974); *see also* David, Rasmussen & Holst, *Postpartum and Postabortion Psychotic Reactions*, 13 Fam. Plan. Persp. 88 (1981) (only 11.4 psychiatric admissions per 10,000 abortions). *See generally* NAS REPORT, *supra* note 10, at 195-196.

[82] Adler & Dolcini, *supra* note 77, at 84 (and references cited therein).

as measured by standardized psychological tests.[83] Moreover, there is no evidence to support the proposition that any distress resulting from an adolescent's abortion would be mitigated by involuntary parental notification.

An abortion removes serious potential constraints on the minor's life and future. After an abortion, the adolescent can resume her normal life and activities in school, at home, and with peers. In contrast, "adolescent mothers are significantly more likely to curtail their education, to be relegated to low-paying jobs, to be single parents, and to be on welfare," [84] as well as to experience repeat pregnancies and, for those who marry to legitimate the birth, greater marital instability.[85]

As the National Academy of Sciences recently reported, "on the basis of existing research . . . *the contention that adolescents are unlikely or unable to make well-reasoned decisions or that they are especially vulnerable to serious psychological harm as a result of an abortion is not supported.*" [86] Moreover, as noted above, those who need support and can get it from their parents typically seek it voluntarily. For these reasons, it is unsurprising that bypass proceedings invariably result in a ruling favorable to the minor.

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[83] *Shusterman*, *supra* note 77.

[84] NAS REPORT, *supra* note 10, at 18.

[85] *Consequences*, *supra* note 77, at 96. Regardless of one's moral position on abortion itself, and *amici* take none herein, the data strongly support the position that abortion is more psychologically benign than carrying to term for almost all adolescents.

[86] NAS REPORT, *supra* note 10, at 277 (emphasis added). "Perhaps the most authoritative form of post-publication review of scientific findings occurs when organizations such as the National Academy of Sciences . . . appoint panels of the most distinguished scientists in the field, provide them with ample time and resources, and commission a state-of-the-art evaluation of a given area of research." Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. Pa. L. Rev. 477, 501 (1986).

CONCLUSION

Both the Minnesota and Ohio statutes impose significant burdens on adolescents' right to choose whether to abort or carry to term without significantly advancing any of the asserted state interests. In these circumstances, even parental notification statutes that provide for judicial bypass impose unconstitutional burdens on mature adolescents and adolescents whose interests would be better served by not notifying their parents. The judicial process is invariably stressful and virtually always affirms the minor's choice to proceed without parental involvement. Moreover, to mandate parental notification and *not* provide for judicial bypass would be intolerable, leaving minors mature enough to decide for themselves, and those whose best interests would be injured substantially by parental notification, with a choice between suffering this statutorily imposed injury or carrying to term. Such a fearful choice cannot constitutionally be imposed without a substantial reason.

Amici therefore respectfully submit that the decision of the Eighth Circuit should be reversed and the Minnesota statute struck down in its entirety, and that the decision of the Sixth Circuit concerning the Ohio statute should be affirmed.

Respectfully submitted,

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APPELLANTS AND CROSS APPELLEES,
v.
MINNESOTA,
APPELLEES AND CROSS APPELLANTS.

On appeal from the United States Court of Appeals for the Eighth Circuit

No. 88-805

OHIO,
APPELLANT,
v.
AKRON CENTER FOR REPRODUCTIVE HEALTH,
APPELLEE.

On appeal from the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* IN SUPPORT OF HODGSON APPELLANTS AND AKRON APPELLEES BY The Center for Population Options, et al.
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American Jewish Congress
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TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of *Amici Curiae* 1

Summary of Argument 1

Argument 4

I. A Decision By This Court To Take Away or Constrain the Fundamental Right To Choose Would Devastate Teenage Girls 4

A. *Teenage Pregnancy Is Almost Always Unintended* 5

B. *Teenage Pregnancy and Childbearing Is Highly Risky Physically and Psychologically for Teenage Girls and the Children They Bear* 6

C. *Pregnant Teenagers, Teenage Mothers and Their Families Are More Likely to Lose Educational and Economic Opportunities and To Be Dependent Upon Public Support* 9

D. *Teenage Girls Need Even More Privacy in Matters of Sexuality Than Older Women and Forced Parental Involvement Harms, Rather Than Enhances, the Quality of Their Decision Making in Matters of Reproductive Rights* 12

II. The Fundamental Right of Minors To Exercise Their Right To Choose Should Not Be Conditioned on Parental Notice or Consent, and Certainly Not Without A Meaningful Judicial or Comparable By-Pass 14

A. ***Parental Notification Laws and Parental Consent Laws Are Functionally Equivalent Because They Cause the Same Harm, and Because For Minors They Impose the Same Burden*** 15

B. ***Parental Notification or Consent Requirements Are Unduly Burdensome and Fail in Operation to Serve Their Intended Purposes*** 16

Page

1. *Parental Notification or Consent Requirements Do Not Protect Minors From Making Immature Decisions* 16
2. *Parental Notification or Consent Requirements Do Not Enhance Intrafamily Communications* 18
3. *Parental Notification or Consent Requirements Harm Pregnant Teenage Girls by Delaying Their Abortion Choice* 19
4. *The Requirement That, to Avoid a Court Hearing,* Both *Parents Must Be Notified is Unduly Burdensome and Contrary to the State's Asserted Purposes in Many Family Situations* 21

C. *If Court Upholds Parental Notification, it Must Preserve a Judicial or Other By-Pass to Protect Minors' Privacy Rights, and the By-Pass Must Be Meaningful and Workable* 22

1. *By-Pass Must Be Preserved* 22
2. *By-Pass Must Be Meaningful and Workable* 23

Conclusion 27

TABLE OF AUTHORITIES

Cases:

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Akron Center for Reproductive Health v. *Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd*, *Akron Center for Reproductive Health* v. *Slaby*, 854 F.2d 852 (6th Cir. 1988), *jurisdiction noted*, 109 S.Ct. 3239 (1989) ... 25, 28
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Page

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In re T.W., 543 So.2d 837 (Fla. App. 5 Dist. 1989) 26
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La. Rev. Stat. Ann. § 40:1299:35:5 (1989 Cum. Supp.) .. 25
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Ohio Rev. Code § 2151.85 (1988 Supp.) 14
Ohio Rev. Code § 2505.073 (1988 Supp.) 14
Ohio Rev. Code § 2919.12 (1988 Supp.) 14
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Page

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Page

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Page

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Interest of *Amici Curiae*

The Center for Population Options and other amici, whose interests are identified in Appendix A, are individuals and organizations concerned with problems of teenage pregnancy and too-early childbearing, and the need for confidential access to safe, legal abortion services for minors. Based on their experience and expertise with teenage girls, *amici* wish to bring to the Court's attention facts concerning the medical risks and societal cost of teenage pregnancy and too-early childbearing, and to urge that the Court allow minors to exercise the fundamental right to choose abortion without the compelled involvement of their parents.[1]

Summary of Argument

This brief focuses on pregnant teenage girls, on the individual and societal importance of preserving their right to make a personal individual choice between abortion and childbirth without the compelled involvement of their parents, and on the devastating harm that removing or restricting that right would cause to teenage girls in particular. At minimum, preservation of their right to choose requires that the state not compel parental notice or consent unless it provides for a meaningful judicial or other alternative.

Whatever we might wish, sexual activity and unintended pregnancies have become a concrete reality of teenage girls' lives. Because most teenage pregnancies are unintended, and because unwanted childbirth and motherhood are so exceptionally burdensome for a teenage girl, a pregnant teenager's right to determine her future must include the right to choose safe, legal abortion instead of childbirth. Legislatively-compelled parental notification can be the functional equivalent of a parental veto of the abortion choice. Teenage girls, therefore, need to be able to make this decision with the support of

[1] This brief is filed with the consent of the parties.

those they choose, including parents, but without the *forced* involvement of their parents, which could result in delays, outright denial of abortion or severe, even violent, consequences.

The life-shaping importance to teenage girls of their existing right to make a personal, individual choice whether to terminate a pregnancy is illustrated in these striking facts:

- Over 1 million teenagers become pregnant each year.[2]
- 84% of all teenage pregnancies (married and unmarried) are unintended.[3]
- 92% of premarital teenage pregnancies are unintended.[4]
- 42% of pregnant teenage girls choose abortion each year, and 44% of these are under the age of 18.[5]
- One in four teenage mothers drops out of high school, and only one in fifty finishes college.[6]
- In 1987, families begun with a teenage birth cost the federal government $19.27 billion in welfare payments.[7]

[2] Alan Guttmacher Institute [AGI], *Teenage Pregnancy in the United States*, Table 4 (1989) [AGI, *Teenage Pregnancy in the U.S.*]; Ventura, Taffel & Mosher, *Estimates of Pregnancies and Pregnancy Rates for the United States, 1976-85*, 78 Am. J. Pub. Health 506, 508, Table 2 (1988) (data for 1972 to 1985; 1985 is latest year for which detailed statistics on abortion are available); AGI, *Teenage Pregnancy: The Problem That Hasn't Gone Away* 17 (1981) [AGI, *Teenage Pregnancy*].

[3] Jones, Forrest, Goldman, Henshaw, Lincoln, Rosoff, Westoff & Wulf, *Teenage Pregnancy in Industrialized Countries* 40 (1986) [Jones, *et al.*]. Calculations by CPO from cited data.

[4] *Id.*

[5] AGI, *Teenage Pregnancy in the U.S.*, *supra* n. 2, Table 1; Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-83*, 19 Fam. Plan. Persp. 5 (1987).

[6] Center for Population Options [CPO], *The Facts: Teenage Childbearing, Education, and Employment* (1987).

[7] CPO, *1988 Report: Estimates of Public Cost for Teenage Childbearing in 1987* at 2 (1988) [CPO, *1988 Report*] (calculating payments under Food Stamps, Medicaid and Aid to Families with Dependent Children (AFDC) programs). The $19.27 billion represents more than half of all payments under these three programs.

- Parental notification requirements do not significantly increase parental involvement in the abortion decision.[8]
- Forced parental notification of the decision to abort would cause 20% of teenage girls who would not voluntarily consult their parents to self abort or have an illegal abortion rather than notify their parents.[9]
- Only 4% of unmarried teenage mothers surrender their infants for adoption.[10]

As this Court (including Chief Justice Rehnquist) observed in its leading case concerning minors and abortion:

> [T]he potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, *there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.*[11]

[8] *Hodgson* v. *Minnesota*, 648 F.Supp. 756, 775 (D. Minn. 1986), *rev'd on legal grounds*, 853 F.2d 1452 (8th Cir. 1988) (en banc); Blum, Resnick & Stark, *The Impact of a Parental Notification Law on Adolescent Abortion Decision-Making*, 77 Am. J. Pub. Health 619, 620 (1987); Torres, *Does Your Mother Know ... ?*, 10 Fam. Plan. Persp. 280, 281 (1978).

[9] Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 288-289 & Table 7 (1980).

[10] AGI, *Teenage Pregnancy*, *supra* n. 2, at 27.

[11] *Bellotti* v. *Baird*, 443 U.S. 622, 642 (1979) [*Bellotti II*] (plurality opinion) (emphasis added). The statement quoted in text surely commanded the support of eight members of the Court. *See id.* at 652 (concurring opinion of Justices Stevens, Brennan, Marshall, and Blackmun).

Part I of this brief, thus, will describe the unintended and unanticipated nature of most teenage pregnancy; the heightened physical and psychological risks to teenage girls of pregnancy and childbearing, which greatly exceed the risks of abortion at any stage of pregnancy; the overwhelming costs to teenage girls and to society of teenage pregnancy and too-early childbearing; the privacy needs of teenage girls in matters of sexuality and reproductive choice; and the severe, even violent, harm that follows from compelling unwanted parental involvement in the abortion decision. Part II will describe how a minor must be able to exercise her fundamental right to choose abortion without the compelled participation of her parents; will explain why minors must at least retain a judicial consent ("by-pass") or other alternative to such compelled participation; and will propose rules and guidelines for by-pass alternatives to compelled parental participation (specifically referring to those that have been successfully used in Massachusetts for nearly ten years).

Argument

I. A Decision by This Court to Take Away or Constrain the Fundamental Right to Choose Would Devastate Teenage Girls.

This Court would devastate the lives of teenage girls by erecting such insuperable barriers to their long-recognized fundamental right to choose between abortion and childbirth as compelled parental consent or notification. Teenage sexual activity and unintended pregnancies are concrete realities of American life today. Constraining the right to choose abortion by forcing parental involvement in the decision will not reduce teenage sexual activity or unintended teenage pregnancy.[12]

[12] In the United States today, seven out of ten teenage girls and eight out of ten teenage boys have sexual intercourse by the time they reach age twenty. CPO, *The Facts: Teenage Sexuality, Pregnancy, and Parenthood* (1987). As to unintended pregnancies, *see supra* notes 2-7 and statistics in the accompanying text.

What it will do is delay the abortion choice, provoke unnecessary crisis and disharmony in family relations and dramatically increase unwanted teenage childbearing, all with profoundly adverse costs to teenage girls' lives and futures.

A. *Teenage Pregnancy Is Almost Always Unintended.*

Teenage girls do not become pregnant by design. Eight out of ten of the 1.1 million teenage pregnancies in the United States each year are unintended.[13] Most teenagers do not use contraceptives or use them inconsistently, especially in the early months of sexual activity, whether due to ignorance or ambivalence about contraception, or ambivalence about sexuality, or both.[14] Thus, among unmarried teenagers who be-

Studies show that the restrictions on the availability of abortion caused by parental notification and consent laws do not reduce teen pregnancy. Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397, 400 (1986). The most effective way to reduce teen pregnancy is not to restrict or deny access to abortion but to increase sex education and the availability of contraception. A study comparing teenage pregnancy in the United States with that of other industrialized countries found sexual activity in the United States was comparable to that in other countries, but that teenage pregnancy and birth rates were lower in other countries because of greater availability of sex education, contraceptives and abortion services. Jones, *et al.*, *supra* n. 3, at 234-35.

[13] Jones, *et al.*, *supra* n. 3. 92% of pregnancies to unwed teenage girls are unintended and 51% of pregnancies to married teens are unintended. Altogether, approximately 84% of all teenage pregnancies are unintended, since the vast majority of teen pregnancies (almost 80%) occur out-of-wedlock. *Id.*

[14] AGI, *Teenage Pregnancy*, *supra* n. 2, at 14-16; Zelnick & Kantner, *Sexual Activity, Contraceptive Use and Pregnancy Among Metropolitan-Area Teenagers: 1971-1979*, 12 Fam. Plan. Persp. 230, 236, Table 8 (1980); Zabin & Clark, *Institutional Factors Affecting Teenagers' Choice and Reasons for Delay in Attending a Family Planning Clinic*, 15 Fam. Plan. Persp. 25 (1983). Zabin's study reports that teens tend to delay almost a year (median of 11.5 months) after becoming sexually active before going to a family planning clinic. Moreover, nearly two thirds of unmarried teenage girls reported that they never used contraceptives or did so inconsistently. AGI, *Teenage Pregnancy*, *supra* n. 2, at 14. The reasons for failure to use contraceptives vary, including those who thought they could not become pregnant, those who did not expect to have sexual intercourse, those who "couldn't [use them] under the circumstances," and those who did not know how to get contraceptives. *Id.*

come pregnant, *fifty percent* of pregnancies occur within the first six months of becoming sexually active; *twenty percent* occur within the first month.[15] Forty-two percent of all teenage girls (married or unmarried) choose to resolve their unwanted pregnancies through abortion.[16] These statistics, which reflect the relatively low impact of current contraceptive availability and education on the teenage pregnancy rate, demonstrate that the vast majority of teenage girls do not focus on the issue of whether to bear a child and how childbearing will affect their future until an unintended pregnancy forces them to do so.

At this critical juncture in teenage girls' lives, abortion becomes an especially important — and in many cases life-saving — reality. Common sense, as well as the results of abortion restrictions directed specifically at minors,[17] teaches that erecting barriers to the right to choose abortion will not reduce teenage sexual activity and pregnancy; it will simply increase unwanted teenage childbearing.

B. *Teenage Pregnancy and Childbearing Is Highly Risky Physically and Psychologically for Teenage Girls and the Children They Bear.*

Adolescent pregnancies carried to term, and resulting childbearing, are usually very detrimental physically and psychologically for teenage girls, as well as for the infants they bear. During pregnancy, teenagers are at much higher risk of suffering from serious medical complications, including iron-deficiency anemia, pregnancy-induced hypertension ("toxemia", which is a leading cause of mortality), complications from small pelvises, and cervical immaturity resulting in premature

[15] Hofferth, *Contraceptive Decisionmaking Among Adolescents*, in *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing*, Vol. II., at 64 (Hofferth & Hayes eds. 1988) [*Risking* Vol. II]; AGI, *Teenage Pregnancy*, *supra* n. 2, at 16, 19.

[16] AGI, *Teenage Pregnancy in the U.S.*, *supra* n. 2, Table 1.

[17] Cartoof & Klerman, *supra* n. 12, at 400.

births.[18] Mortality rates from continued pregnancy and childbearing are much higher for teenage girls than for women aged 20-24.[19] Teenage girls aged 15-19 are twenty-four times more likely to die from childbirth than from first-trimester abortion,[20] and the dangers are considerably higher for girls under age 15.[21] By contrast, for all women, but especially for teenage girls, abortion is one of the safest surgical procedures doctors perform.[22] At no time during pregnancy do the risks of abortion surpass the risks of continuing the pregnancy to delivery.[23] The same is true for rates of morbidity — serious illness or injury with lasting effects — related to childbirth when compared to abortion.[24]

A major reason why the health risks of pregnancy and childbearing are greater for teenage girls than for adult women is

[18] Hunter, *Time Limits on Abortion*, in *Reproductive Laws for the 1990s*, at 134 & n. 15 (Cohen & Taub eds. 1989); National Commission to Prevent Infant Mortality, *Death Before Life: The Tragedy of Infant Mortality*, Appendix at 103 (1988) [NCPIM]. Inadequate prenatal care, a problem especially common for teenage girls, is associated with excessive weight gain, premature labor, prolonged labor, vaginal infections and vaginal lacerations. Mackinson, *The Health Consequences of Teenage Fertility*, 17 Fam. Plan. Persp. 132, 134 (1985).

[19] Ory, *Mortality Associated with Fertility and Fertility Control*, 15 Fam. Plan. Persp. 57, 59, Table 2 (1983). Calculations by CPO from cited data.

[20] *Id.*

[21] Sacker & Neuhoff, *Medical and Psychosocial Risk Factors in the Pregnant Adolescent*, in *Pregnancy in Adolescence: Needs, Problems, and Management* 107 (Stuart & Wells eds. 1982); *Risking The Future: Adolescent Sexuality, Pregnancy and Childbearing*, Vol. I, at 124 (C. Hayes ed. 1986) [*Risking*, Vol. I].

[22] Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in *Abortion and Sterilization: Medical and Social Aspects*, 155, 177 (Hodgson, ed. 1981). "Complications following induced abortion are generally lower among adolescents than among older women, regardless of the gestation at which the abortion is performed or the method used." *Risking*, Vol. I, *supra* n. 21, at 125; *see also*, Cates, *Adolescent Abortions in the United States*, 1 J. Adolescent Health Care 18, 19-22 (1980) [Cates]; Cates, Schultz & Grimes, *The Risks Associated With Teenage Abortion*, 309 N. Eng. J. of Medicine 621 (1983).

[23] Tietze & Henshaw, *Induced Abortion: A World Review 1986*, at 110, 111 (1986).

[24] Cates, *supra* n. 22, at 20; Cates & Grimes, *supra* n. 22.

that teenagers delay seeking prenatal care if they seek it at all.[25] In New York City, more than one third of pregnant teenage girls received no prenatal care or only last-trimester care, compared to eighteen percent for women as a whole.[26]

Teenage pregnancy, exacerbated by inadequate prenatal care, also leads to premature births and low birth weight,[27] which in turn are leading causes of infant morbidity and mortality. Low birth-weight infants are at increased risk of neurodevelopmental problems, especially cerebral palsy, seizure disorders and mental retardation.[28] Children of teenage mothers are twice as likely to die in infancy than those born to women in their 20s, and are also more likely to die than children of women in their 40s, whose children are also a high-risk group.[29] Low birth weight is also associated with longer-term

[25] Mackinson, *supra* n. 18, at 134. Teens tend to seek prenatal care later than adult women because of its cost, ambivalence or denial concerning their pregnancy, a desire for secrecy and confidentiality, difficulty in scheduling appointments, and/or lack of knowledge about the health care system. Institute of Medicine, *Prenatal Care: Reaching Mothers, Reaching Infants* 78, 101 (Brown ed. 1988) [Inst. of Medicine, *Prenatal Care*]. Policies of some clinics and hospitals to notify parents when minors use their services affects minors' decision to seek prenatal care and choice of clinics. *See* Zabin & Clark, *supra* n. 14, at 26, 27, 29.

[26] Hunter, *supra* n. 18, at 134, citing to *New York City Dep't of Public Health, Summary of Vital Statistics* 16, 17 (1986). Nationally, 13 percent of teens receive late or no prenatal care whereas only 6 percent of women as a whole receive late or no prenatal care. National Center for Health Statistics, *Advance Report of Final Natality Statistics*, Monthly Vital Statistics Report 38:3 Table 30 (1989) [NCHS].

[27] AGI, *Teenage Pregnancy*, *supra* n. 2, at 29; NCHS, *supra* n. 26, Table 15.

[28] Institute of Medicine, *Preventing Low Birthweight* 26-29, 32-33, 37 (1985); *Substantially Higher Morbidity and Mortality Rates Found Among Infants Born to Adolescent Mothers*, 16 Fam. Plan. Persp. 91-92 (1984).

[29] AGI, *Teenage Pregnancy*, *supra* n. 2, at 29. Studies show that other factors such as the mother's socioeconomic status, health care and nutritional habits and education also contribute to health and developmental problems of low birth-weight babies. Teenage mothers are at a high risk of experiencing these characteristics. Mackinson, *supra* n. 18, at 137-38; NCPIM, *supra* n. 18, at 103; *Social Factors, Not Age, Are Found to Affect Risk of Low Birth Weight*, 15 Fam. Plan. Persp. 142-43 (1984).

problems, including a greater frequency of illness, and developmental problems such as lack of success in school.[30]

An *unwanted pregnancy* is a serious and emotionally traumatic event in a teenager's life. Before abortions were legal and accessible to minors in a confidential manner, a large proportion of teenage girls who attempted or succeeded in suicide thought they were, or actually were, pregnant.[31] Few teenagers have adverse psychological reactions to abortion, and most are relieved to have terminated an unwanted pregnancy:[32] "[t]here is no research evidence to support" the assumption that "adolescents are especially vulnerable to serious psychological harm as a result of having an abortion."[33] To the contrary, pregnancy continuation poses "far greater psychological, physical, and economic risks to the adolescent than does abortion."[34]

C. *Pregnant Teenagers, Teenage Mothers and Their Families Are More Likely to Lose Educational and Economic Opportunities and to Be Dependent Upon Public Support.*

Childbearing irrevocably alters the life of a teenage girl. When a woman is ready to bear a child, motherhood is one of the most rewarding and fulfilling of life's experiences. But unwanted motherhood is devastating, especially for a teenage

[30] Inst. of Medicine, *supra* n. 28, at 32-33.

[31] Teicher, *A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide*, in *Current Issues of Adolescent Psychiatry* 129, 136 (Schoolar ed. 1973).

[32] Adler & Dolcini, *Psychological Issues in Abortion for Adolescents*, in *Adolescent Abortion: Psychological and Legal Issues* 84 (Melton ed. 1986).

[33] American Psychological Association, Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion: Psychological and Legal Issues*, 42 Am. Psychologist 73, 74 (1987) [APA].

[34] Lewis, *Minors' Competence to Consent to Abortion*, 42 Am. Psychologist 84, 87 (1987); *see also* Marecek, *Consequences of Adolescent Childbearing and Abortion*, in *Adolescent Abortion: Psychological and Legal Issues* 96-115 (Melton ed. 1986); Adler & Dolcini, *supra* n. 32, at 90; Cates, *supra* n. 22, at 22.

girl. The cost of too-early childbearing is borne not just by the teenager, whose future is suddenly restricted, but by the child she bears and by society as a whole. These costs exist today — in a world in which teenagers *have* a right of abortion choice. The elimination or constriction of that choice could only make those costs vastly higher.

Pregnancy is the leading reason teenage girls drop out of school. One in four teenage mothers drops out of high school and only one in fifty graduates from college. By comparison, one in five women who put off childbearing until their mid-20s graduates from college.[35] Teenage mothers' family responsibilities and frequently truncated education lead them into lower-paying, lower-status jobs, where they accumulate less work experience and earn lower annual wages than women who postpone childbearing.[36]

Children born to teenagers from an unwanted pregnancy will be disadvantaged educationally, socially, and psychologically.[37] They tend to have lower I.Q. and achievement scores, and less success in school.[38] According to expert testimony before Congress on behalf of the American Public Health Association, children born of unwanted pregnancies experienced lower scholastic achievement, had less job satisfaction, fewer and less satisfying relations with friends, lovers and spouses, and began sexual activity earlier than children born of ac-

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[35] CPO, *Teenage Childbearing*, *supra* n. 6; *Risking*, Vol. II, *supra* n. 15, at 125-28. Teenage fathers are also more likely to drop out of high school than their counterparts who remained childless throughout their teens. The lower high school completion rate for teenage fathers restricts their financial ability to support their partner and child. Marsiglio, *Adolescent Fathers in the United States: Their Initial Living Arrangements, Marital Experience and Educational Outcomes*, 19 Fam. Plan. Persp. 241, 247, 249 (1987).

[36] CPO, *Teenage Childbearing*, *supra* n. 6; *Risking*, Vol. I, *supra* n. 21, at 130-32.

[37] *See generally*, Marecek, *supra* n. 34.

[38] Baldwin & Cain, *The Children of Teenage Parents*, 12 Fam. Plan. Persp. 34, 37 (1980); *Adolescent Pregnancy and Childbearing — Rates, Trends and Research Findings From the CPR, NICHD* 10-11 (1988) [*Adolescent Pregnancy and Childbearing*].

cepted pregnancies.[39] "In the aggregate, unwantedness in early pregnancy and involuntary child-bearing have a detrimental effect on the subsequent psychosocial development of the child with socially undesirable longer term implications."[40] That these children could be both unwanted, and forced upon a teenage girl by the state, is doubly tragic.

Teenage motherhood also imposes enormous costs on society. Teenage mothers, whose educational and economic achievement is severely restricted, are more likely to become dependent on public support. Fifty-three percent of AFDC payments are allotted to families that began when the mother was a teenager.[41] In 1987 alone, the federal government spent $19.27 billion in AFDC, Medicaid and Food Stamp benefits on families in which the mother first gave birth as a teenager.[42] It is estimated that over the next twenty years, the federal government will spend $5.7 billion in welfare payments to all babies born in 1987 to teenage girls.[43] Moreover, children of teenage parents are more likely to become teenage parents themselves, thus perpetuating the cycle of poverty begun by a teenage birth.[44]

Too-early childbearing is already a serious public health problem. Erecting barriers to the right to choose abortion will reverse the recent success in reducing the teenage birth rate

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[39] David, *Abortion Obtained and Denied: Psychosocial Risks, Statement prepared for presentation to the Subcommittee on Human Resources and Intergovernmental Relations of the Committee on Government Operations of the U.S. House of Representatives*, at 6 (Mar. 1989).

[40] *Id.*

[41] CPO, *Estimates of Public Costs for Teenage Childbearing* (1986); CPO, *Estimates of Public Costs for Teenage Childbearing* (1987); CPO, *1988 Report*, *supra* n. 7.

[42] CPO, *1988 Report*, *supra* n. 7, at 2. In 1975, 64 percent of AFDC mothers under age 30 had been teenage mothers compared to 24 percent of American women as a whole between age 20 and 30. *Adolescent Pregnancy and Childbearing*, *supra* n. 38, at 12.

[43] CPO, *1988 Report*, *supra* n. 7, at 3.

[44] CPO, *Teenage Childbearing*, *supra* n. 6; *Risking*, Vol. I, *supra* n. 21, at 134; *Adolescent Pregnancy and Childbearing*, *supra* n. 38, at 11.

and frustrate efforts to bring more women into early prenatal care,[45] making an already tragic situation worse.

D. *Teenage Girls Need Even More Privacy in Matters of Sexuality Than Older Women and Forced Parental Involvement Harms, Rather Than Enhances, the Quality of Their Decision Making in Matters of Reproductive Rights.*

Many teenage girls who are faced with reproductive decisions are just becoming acquainted with their own sexuality.[46] Their ambivalence and discomfort over sexual matters enhance their need for confidentiality and privacy in matters of reproductive choice, exceeding that of adult women.[47] For example, confidentiality is a primary reason teenagers choose a particular family planning clinic.[48] Forced parental notification of contraceptive use also leads to a decline in adolescent clinic use and effective use of contraceptives, but not to a decline in sexual activity, thus leading to a rise in unintended pregnancies among teens.[49] Although most teens, particularly young teens, voluntarily involve a parent in a pregnancy deci-

[45] AGI, *Teenage Pregnancy in the U.S.*, *supra* n. 2, Table 5.

[46] Fifty percent of pregnancies among unmarried teenagers occur during the first six months of sexual activity and twenty percent occur during the first month. *See supra* n. 15 and accompanying text.

[47] Unmarried teenage girls are especially concerned to keep confidential the existence of a pregnancy and their decision whether to terminate it. For example, one study found that a desire to keep the pregnancy secret and a need for confidentiality in obtaining prenatal health care services led many teens to seek late prenatal care and influenced their choice in health care providers. Institute of Medicine, *Prenatal Care*, *supra* n. 25, at 78. A study of 17 deaths following post-*Roe* illegal abortions concluded that a desire for secrecy was the primary reason two teenagers who died had self aborted. Binkin, Gold & Cates, *Illegal Abortion Deaths in the United States: Why are They Still Occurring?* 14 Fam. Plan. Persp. 163, 165 (1982); *see also Bellotti II*, 443 U.S. at 644 (requiring "anonymity" for minors' judicial consent for abortion proceedings).

[48] Zabin & Clark, *supra* n. 14, at 26, Table 1.

[49] Torres, *supra* n. 8, at 282. One study found that 58% of minors who attended a family planning clinic without their parents' knowledge (which represented 23% of those attending) would stop attending if their parents were notified. Of those, 65% would stop using medically prescribed contraceptives (i.e., pill, IUD, diaphragm) and would resort to non-medical methods (i.e., condom, foam, withdrawal), 10% would use no contraception at all, and only 10% surveyed said they would refrain from intercourse. Torres, Forrest & Eisman, *supra* n. 9, at 291, Table 10.

sion,[50] those teenage girls who choose not to involve their parents do so for good reasons, ranging from a concern for their parents' feelings to fear of violence or other serious negative consequences, to fear of being prevented from obtaining an abortion.[51]

Parental notification and consent requirements, where they exist, have failed significantly to increase parental involvement in their daughters' reproductive decisions.[52] Instead, most minors who do not choose to consult their parents find ways to avoid compelled parental involvement. For example, more than half of minors who attend family planning clinics without their parents' knowledge would stop attending if their parents were notified. A chilling thirty-nine percent of these girls stated that they would have an illegal or self-induced abortion rather than notify their parents as a condition of a legal abortion. Some would leave home, and four in ten surveyed said that they would carry to term rather than inform their parents of their decision to abort, thus giving up the exercise of their fundamental right to choose abortion.[53]

[50] Studies show that approximately 55% percent of girls under 18 voluntarily discuss matters of reproductive choice with one or both parents. Torres, Forrest & Eisman, *supra* n. 9, at 287 (55% discuss decision to have abortion with parents); Torres, *supra* n. 8, at 281 (55% discuss participation in family planning clinic with parents).

[51] Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 Am. J. Pub. Health 283, 284 (1982); Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Fam. Plan. Persp. 259, 260-262 (1983).

[52] Blum, Resnick & Stark, *supra* n. 8, at 620; Cartoof & Klerman, *supra* n. 12, at 400; Torres, *supra* n. 8, at 282.

[53] Torres, Forrest & Eisman, *supra* n. 9, at 289, Table 7. This study found that 55% of minors attending a family planning clinic did so with their parents' knowledge and 1% were not sure whether their parents knew. 21% of those surveyed would not voluntarily inform their parents, but would still

II. The Fundamental Right of Minors To Exercise Their Right To Choose Should Not Be Conditioned on Parental Notice or Consent, and Certainly Not Without A Meaningful Judicial or Comparable By-Pass.

The right to terminate a pregnancy free from unwarranted governmental intrusion remains fundamental for both adult women and minor girls,[54] and regulations that impinge on fundamental rights are assessed with heightened scrutiny.[55] Employing heightened scrutiny, the Court must strike down as unconstitutional an unduly burdensome state regulation that the state fails to demonstrate is narrowly tailored to further a compelling interest.[56]

The Minnesota and Ohio statutes,[57] though ostensibly meant to protect minors from making immature decisions and to enhance intrafamily communications, *in fact* fail to accomplish these purposes. At the same time, they impose severe burdens on teenage girls and their families, the very groups they are meant to protect. Accordingly, these statutes are, in

attend the clinic if their parents were required to be notified. The remaining 23% said they would not attend the clinic if their parents were notified: 9% (which represents 39% of the 23% who would no longer attend the clinic) would have an illegal or self-induced abortion; 9% would carry to term; 2% would leave home; and 3% said they did not know what they would do. *Id.*

[54] *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986); *Bellotti* v. *Baird*, 443 U.S. 622, 633 (1979) *(Bellotti II)*; *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 74-75 (1976); *Roe* v. *Wade*, 410 U.S. 113, 153 (1973); *see Webster* v. *Reproductive Health Servs.*, 109 S.Ct. 3040, 3058 (1989).

[55] *Webster*, 109 S.Ct. at 3063 (O'Connor, J., concurring) (regulation that "unduly burdens" right to seek abortion is unconstitutional); *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 427 (1983); *Bellotti II*, 443 U.S. at 640; *Roe* v. *Wade*, 410 U.S. at 155.

[56] *Id.*; Shaman, *Constitutional Fact: The Perception of Reality by the Supreme Court*, 35 U. Fla. L. Rev. 236, 245 (1983) ("To uphold a regulation without determining that it will in fact [further the state's asserted interest] . . . would be inconsistent with the principles of heightened scrutiny.").

[57] Minn. Stat. Ann. § 144.343(2)-(7) (1989); Ohio Rev. Code §§ 2151.85, 2505.073, 2919.12 (1988 Supp.).

the constitutional sense, not only unduly burdensome, they are not minimally rational.

A. *Parental Notification Laws and Parental Consent Laws Are Functionally Equivalent Because They Cause the Same Harm, and Because For Minors They Impose the Same Burden.*

For minors, there is no real-world difference between parental consent and notification laws.[58] The dangers posed by such requirements are the same: compelled involvement of parents can lead to severely negative, even violent, parental reactions, including preventing the minor from having the desired abortion.[59] According to one study, twenty percent of girls who had decided to have an abortion without their parents' knowledge would carry to term if their parents were *notified* of their decision to have an abortion.[60] In reviewing Minnesota's two-parent notification requirement, the District Court found *as a fact* that revelation of a pregnancy or proposed abortion can lead to obstruction of the desired abortion and, particularly in dysfunctional families, violence and abuse.[61] Parental notification requirements, as well as consent requirements, therefore, can easily act as a veto of a minor's abortion decision. By definition, such an outright veto unduly burdens a minor's right to choose.

[58] Three members of the present Court and Justice Powell have recognized that parental notification requirements are the functional equivalent of consent in the burdens they impose on a minor's exercise of her right to choose. *See H.L.* v. *Matheson*, 450 U.S. 398, 420 & n. 9 (1981) (Powell, J., concurring); *id.* at 437-441 (Marshall, J., dissenting, joined by JJ. Brennan & Blackmun).

[59] Approximately 30% of minors surveyed in one study who did not inform their parents did so for fear of serious negative consequences in the form of physical abuse, other retaliation or being prevented from obtaining the abortion. Clary, *supra* n. 51, at 284.

[60] Torres, Forrest & Eisman, *supra* n. 9, at 288-289 & Table 10.

[61] *Hodgson* v. *Minnesota*, 648 F.Supp. 756, 768-769, 773 (D. Minn. 1986), *rev'd on legal grounds*, 853 F.2d 1452 (8th Cir. 1988) (en banc), *cert. granted*, 109 S.Ct. 3240 (1989).

B. *Parental Notification or Consent Requirements Are Unduly Burdensome and Fail in Operation to Serve Their Intended Purposes.*

Parental notification and consent laws are unconstitutional because they fail to achieve their intended purposes: that of protecting pregnant minors from uninformed or immature abortion decisions, or that of fostering healthy intrafamily communication concerning the decision.[52] Indeed, such laws impose further irrational, gratuitous and useless burdens on minors by damaging their family relationships and delaying their access to abortion services. These statutes were in fact enacted for the unconstitutional purpose of denying access to abortion services.

1. *Parental Notification or Consent Requirements Do Not Protect Minors From Making Immature Decisions.*

Parental notification or consent requirements are overly broad and do not in fact protect minors from making immature decisions. The Minnesota and Ohio statutes, by failing to distinguish mature from immature minors, sweep too broadly. Adolescents as they grow older are generally competent to recognize and assess the consequences of their decisions.[53] Indeed, many states that have enacted parental notification or consent requirements for abortion, including Minnesota and Massachusetts, recognize that minors may be competent to make decisions about their own health care.[54] Minors who are gen-

[52] *Bellotti II*, 443 U.S. at 634.

[53] Lewis, *supra* n. 34, at 85-87.

[54] Minnesota allows *any* minor to give independent consent for diagnosis and treatment for pregnancy, childbearing, venereal disease, alcohol and drug abuse, regardless of his or her maturity. Minn. Stat. Ann. § 144.343(1). In Massachusetts, a pregnant minor or a minor living apart from and financially independent of his or her parents may consent to all forms of medical treatment, including treatment for childbirth, except abortion or sterilization. Mass. Gen L. ch. 112 § 12F (1983 & 1989 Cum. Supp.).

erally less competent to make important decisions, i.e. those who are younger and those who tend to be more conflicted about the decision, generally consult their parents voluntarily.[55] Thus, a notification requirement that covers all minors regardless of age or maturity sweeps too broadly and is not *narrowly* tailored to achieving the state's asserted interest of protecting minors from making immature decisions.

Second, assuming *arguendo* that parental notification and consent requirements were properly motivated, their failure to "protect" immature minors is apparent in their irrational consequences. No intelligible principle could dictate that the best interests of a girl who is so young as to be considered immature and who does not want a child, would best be served by a state-imposed requirement that results in her unwillingly becoming a mother.

The *real* purpose of these statutes is to deny access to abortion. Since abortion is one of the safest medical procedures doctors perform — safer at all stages than childbirth — the special treatment of the abortion decision in these statutes must have as its purpose some reason other than protecting immature minors from making hasty or inadequately-considered decisions about their health care. Such statutes are *over-inclusive* because mature minors are not allowed to consent to an abortion; and they are *under-inclusive* because they allow minors regardless of their maturity to consent to other health care treatment that imposes far greater health risks than abortion.[56] These regulations are neither narrowly tailored, nor even rationally related, to the State's interest in protecting minors from making immature decisions, and are thus unconstitutional.[57]

[55] Lewis, *supra* n. 34, at 87; Torres, Forrest, & Eisman, *supra* n. 9, at 288.

[56] These statutes allow pregnant minors to consent to medical care relating to childbirth, yet teenage girls aged 15-19 are twenty-four times more likely to die from childbirth than from first trimester abortion. Ory, *supra* n. 19, at 50, Table 2. Even an appendectomy is 100 times more dangerous than a legal induced abortion. Cates & Grimes, *supra* n. 22, at 170.

[57] *Thornburgh*, 476 U.S. at 763; *Akron*, 462 U.S. at 427; *Bellotti II*, 443 U.S. at 640; *Roe* v. *Wade*, 410 U.S. at 155.

2. *Parental Notification or Consent Requirements Do Not Enhance Intrafamily Communications.*

These statutes also fail to further, and in practice undermine, the state's alternative asserted purpose of fostering productive intrafamily communication concerning a minor's abortion decision.[68] Most teenagers voluntarily involve their parents.[69] But for those who choose not to involve their parents, these statutes do not significantly increase parents' involvement.[70] Moreover, the evidence at trial in *Hodgson* failed to identify any beneficial effect on intrafamily communication of forced notification. Experts credited by the court testified that voluntariness has been found to be the hallmark of productive family communication, and that forced commu-

[68] *See* Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 Am. Psychologist 79 (1987).

[69] One study found that in Minnesota 65.3% of minors voluntarily consult *at least one* parent. Blum, Resnick & Stark, *supra* n. 8, at 620. In Massachusetts, approximately 75% of minors get the consent of their parents for their abortion. Planned Parenthood League of Massachusetts, *The Massachusetts Parental/Judicial Consent Law for Minors Seeking Abortion* 3 (1988) [PPLM]. Two studies of minors attending clinics found that 55% voluntarily informed their parents of their participation in the clinic and of their decision to have an abortion. Torres, *supra* n. 8, at 281 (clinic use); Torres, Forrest & Eisman, *supra* n. 9, at 287 (abortion decision).

[70] One study found that the primary impact of the Massachusetts consent statute was to drive minors out of state to obtain a confidential abortion. Cartoof & Klerman, *supra* n. 12, at 399. A study comparing the notification rate of minors in Minnesota with that of minors in Wisconsin (which has no notification or consent statute) found only a slightly higher percentage of Minnesota minors notified both parents (as required by statute) than did Wisconsin minors, and that the percentage of minors in both states that voluntarily notified at least one parent was statistically indistinguishable (65.3% compared to 62.1%). Blum, Resnick & Stark, *supra* n. 8, at 620. Witnesses who provided counseling and abortion services to minors both before and after enactment of Minnesota's statute testified at trial in *Hodgson* that they did not observe any post-enactment change in the level of parental participation. 648 F.Supp. at 775. The court explicitly considered and rejected the possibility that the very existence of the statute had encouraged minors, particularly immature, non-best-interest ones, to inform parents of their pregnancy. *Id.*

nication not only fails to promote productive relations but typically damages them. These experts further testified that revelation of a pregnancy or proposed abortion through compulsion or inadvertence "is almost universally negative" and can provoke crisis and disharmony.[71] Such provocation is particularly dangerous in dysfunctional families in which violence and abuse often result from revelation of a pregnancy or desire to terminate it.[72]

3. *Parental Notification or Consent Requirements Harm Pregnant Teenage Girls by Delaying Their Abortion Choice.*

"The abortion decision is one that simply cannot be postponed."[73] Constricting the right to choose abortion by erecting parental notification or consent requirements (even with a bypass) harms teenage girls disproportionately by delaying their abortion choice. And delay is always harmful.

While abortion at any stage of pregnancy is safer for teenage girls than childbirth, delay in seeking and obtaining an abortion, particularly for girls entering their second trimester, has the largest single effect on the risk to teenage girls of complications from abortion.[74] Yet, for various reasons, teenagers are less likely than older women to obtain abortions during the safer, earlier weeks of gestation.[75]

[71] 648 F.Supp. at 766-770. Experts conclude that communication between parents and children about sexual matters is typically closed, and the forced involvement of parents would not lead to more open, productive communication. *Melton*, *supra* n. 67, at 81.

[72] Melton, *supra* n. 67, at 81; Clary, *supra* n. 31 at 284.

[73] *Bellotti II*, 443 U.S. at 643.

[74] Cates & Grimes, *supra* n. 22, at 138; Yates & Pliner, *Judging Maturity in the Courts: The Massachusetts Consent Statute* 78 Am. J. Pub. Health 646, 648 (1988); *see also Hodgson*, 648 F.Supp. at 765. After eight weeks' gestation, the risk of major complications from abortion rises approximately 15-30% for each week of delay. Cates & Grimes, *supra* n. 22, at 138.

[75] *Risking*, Vol. 1, *supra* note 24, at 114. A national survey found that only 34% of abortions obtained by girls ages 15 and younger are performed during the first (and safest) eight weeks of gestation, compared with 41% of

Parental notification and consent requirements necessarily impose additional delay, not only because the minor must wait until the requirements are satisfied, but because the requirements impose another hard and inevitably time-consuming decision on a minor: whether to proceed with such compelled parental involvement, or to pursue alternatives (e.g., going out-of-state or using a judicial by-pass if available). Such further delays only increase the medical risks associated with the abortion procedure to a significant degree.

Even short delays could heighten a patient's emotional tension, increase the costs of the procedure, and push a teenage girl into the second trimester of a pregnancy, when the abortion procedure entails significantly greater financial cost and medical risk.[76] Any increases in the financial costs of the procedure impose heavy, even insurmountable, burdens on teenagers as a group, and fall most heavily on poor teenagers, who tend disproportionately to be members of minority groups. By imposing additional medical risks and prohibitive costs on the

abortions obtained by girls ages 15-19, and 51% of those obtained by women ages 20-24. AGI, *Teenage Pregnancy*, *supra* n. 2, at 33. Adolescents (19 and under) are twice as likely as older women to obtain abortions after twelve weeks. Cates, *supra* n. 22, at 20. One reason for delay is limited access to abortion services, particularly in rural areas, due to difficulties in travel (especially in states with great distances between clinics) and expense. In addition, many teenagers, particularly the very young, fail to recognize the early signs of pregnancy. This may be due to ignorance or because many adolescent girls ordinarily experience menstrual irregularities and therefore do not distinguish them from early signs of pregnancy. *See, e.g.*, AGI, *Teenage Pregnancy*, *supra* n. 2, at 33; *Risking*, Vol. I, *supra* n. 21, at 114; Rosso, *Adolescent Abortion: The Epidemiological Context*, in *Adolescent Abortion: Psychological and Legal Issues* 40, 57 (Melton ed. 1986); Bracken & Kasl, *Delay in Seeking Induced Abortion: A Review and Theoretical Analysis*, 121 Am. J. Obstetrics & Gynecology 1008-1019 (1975).

[76] *Hodgson*, 648 F.Supp. at 782. In *Hodgson*, the District Court found as a matter of fact that the cost of abortion increases with gestational age because of the increased skill necessary to perform the procedure. *Id.* at 761. The Court cited the following fee schedule from one clinic: under 12 weeks, $225; 12-14 weeks, $275; 16-18 weeks, $450; 18-19 weeks, $550; 19-21 weeks, $650. After 21 weeks, patients are referred to a particular hospital where, at 22 weeks, the fee is $1600-1800. *Id.*

abortion choice, parental notification and consent requirements run counter to one of the primary reasons abortion was legalized sixteen years ago — to reduce the devastating health risks of illegal abortion.

4. *The Requirement That, to Avoid a Court Hearing, Both Parents Must Be Notified is Unduly Burdensome and Contrary to the State's Asserted Purposes in Many Family Situations.*

The two-parent notification requirement of the Minnesota statute is not even minimally rational. It contains no exception for a divorced parent or for parents who are separated or absent, or who have never married, or for dysfunctional families in which one resident parent is likely to become violent or abusive to either the young woman or the other parent upon being informed that a daughter is seeking an abortion with the other spouse's approval.[77]

The two-parent consultation requirement was *found* in Minnesota to be a significant burden on minors which undermined, rather than promoted, healthy intrafamily communication. State-mandated contact with an absent, disinterested, estranged, separated, or potentially violent second biological parent was found to be frequently detrimental to the pregnant woman and, indeed, to the one parent who has been consulted, resulting in *reduced* intrafamily communication.[78]

In Minnesota, 20-25% of minors seeking judicial authorization voluntarily consulted with or were accompanied to hearings by one parent, demonstrating the severe problems caused by requiring notice to both parents. Indeed, two-parent consultation requirements had the perverse effect of inhibiting parent-child communication: When the daughter and one parent agree that contact with the other parent will be coun-

[77] Minn. Stat. Ann. § 144.343(3).

[78] *Hodgson*, 648 F.Supp. at 769 ("[i]n these instances, the requirement that minors notify both biological parents actually *reduces* parent-child communication") (emphasis supplied).

terproductive, a legally-imposed need to notify the second parent or obtain a judicial waiver of notification "distracts the minor and her parent and disrupts their communication."[79] Voluntary communication with one parent is actually *reduced* by a requirement that only consultation with both will suffice; some minors were dissuaded from contacting even one parent when only the consent of two would obviate the need for judicial proceedings.[80]

C. *If Court Upholds Parental Notification, it Must Preserve a Judicial or Other By-Pass to Protect Minors' Privacy Rights, and the By-Pass Must Be Meaningful and Workable.*

1. *By-Pass Must Be Preserved.*

This Court has properly held that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy."[81] Although *every* minor may not be competent to make the abortion decision by herself, for those who are competent, the fundamental right to decide bars the state from delegating the decision to another.

To protect all minors' privacy rights to decide to terminate their pregnancies without the forced involvement of their parents, a state must provide a by-pass procedure that allows a minor to seek the advice, counsel and support of another competent adult who can help her make the decision herself and who can determine, if the minor is not mature, whether it is in her best interests to have the abortion.[82] A judicial determination is but one, and in many cases not the best, by-pass procedure.[83]

[79] *Id.* at 778.

[80] *Id.* at 769, 778.

[81] *Danforth*, 428 U.S. at 74; *see Akron*, 462 U.S. at 439-440; *Bellotti II*, 443 U.S. at 643.

[82] Ordinarily, the determination of a minor's competence to consent to medical treatment is made by the minor's physician. In Massachusetts, for *example, the common law mature minor rule allows the physician to determine whether the minor is capable of giving informed consent to medical treatment and whether it is in the minor's best interests to notify his or her parents. Baird* v. *Attorney Gen.*, 371 Mass. 741, 754 (1977). Immature minors already require the consent of *one* parent. *Id.* at 753.

[83] Maine has just enacted a comprehensive statute that provides for parental consent or judicial by-pass, but also provides for critical and meaningful alternatives. The statute authorizes a physician to perform an abortion on a minor after the physician has received the informed written consent of that minor and the physician has ensured that the consent is truly "informed" by counseling the minor according to specific criteria and determining that the minor is mentally and physically competent to give consent. *See* An Act to Require Parental Consent to a Minor's Abortion, 1989 Maine Acts Ch. 573, § 2 ¶ 2(2), (3) (amending 22 Me. Rev. Stat. Ann. § 1597-A).

Wisconsin requires providers of abortion services to encourage minors to notify their parents unless they determine that the minor has a valid reason not to do so. In that situation, the statute provides an alternative to parental notification. The hospital or clinic personnel encourage the minor to notify another family member, a close friend, a school counselor, social worker or other appropriate person. Wis. Stat. Ann. § 146.78(3) (1989).

Without a judicial by-pass or other alternative to parental involvement in the abortion decision, four out of ten minors — those who would choose not to consult their parents — will be denied their fundamental right to choose to terminate their pregnancy in private. Some will succumb to anti-choice pressure or their parents' will that they carry to term, others will have an illegal abortion or self-abort, and others will suffer the negative, even violent, consequences that the revelation of their pregnancy or abortion decision causes.

2. *By-Pass Must Be Meaningful and Workable.*

Amici wish to emphasize that by-pass does not *cure* the burdens caused by forced parental notification or consent, particularly two-parent notification or consent. Nor do *amici* endorse the concept of judicial by-pass as the best way to protect minors' constitutional rights. Nevertheless, it is the *minimum* necessary to protect minors' constitutional rights to decide to terminate their pregnancy without an actual or *de*

facto parental veto. Accordingly, a judicial by-pass provision must be meaningful and workable.

Massachusetts has had the longest experience with judicial by-pass, initiating the procedure in 1981. Over that time the procedure has worked about as well as such a procedure could for those who have chosen to use it: Thousands of minors have petitioned the court, all but a minute handful of petitions have been granted without appeal,[84] and the average time period from the time an attorney is contacted and a hearing takes place is 4-5 days.[85] Key to the "survivable" working of the Massachusetts procedure are the Rules and Guidelines issued by the Massachusetts courts. *See* Appendix B. These Rules and Guidelines provide for the essential elements of expedition, confidentiality, appointment of counsel, and the determination of maturity or best interests. Although the Massachusetts by-pass procedure is not without its problems, this procedure is, *when the Rules and Guidelines are followed*, faithful to the teaching of *Bellotti* v. *Baird*, and, as confirmed by nearly ten years of experience, representative of what such a procedure must entail.

Time is of the essence when deciding to terminate a pregnancy, as each additional week of gestation increases the health risks from abortion. To ensure that petitions are heard expeditiously, the Rules and Guidelines specify that petitions should be heard in chambers on any day the court is in session,

[84] Between April 1981 and February 1988, 5,460 minors sought judicial consent for abortion in Massachusetts pursuant to Mass. Gen. L. ch. 112, § 12S. Only twelve petitions were denied: Of these nine were overturned on appeal within three days, one minor petitioned another court, one went out of state, and one minor obtained parental consent during appellate proceedings. PPLM, *supra* n. 68, at 2.

[85] Yates & Pliner, *supra* n. 74, at 648 (though 4.2-5.2 days was average delay, specific delays ranged from one day to 39 days). Much of the reason for expedition in Massachusetts is a combination of the efforts of *amicus* Massachusetts Judicial Consent for Minors Lawyer Referral Panel and cooperative court personnel. This Court should not be so naive as to think that lawyers and court personnel in other states would necessarily be as helpful. Moreover, by-pass causes other delays: i.e., locating an attorney initially, any appellate proceedings and scheduling the abortion procedure some time after the hearing.

expeditiously, and if possible *on the same day of filing*.[86] The Rules and Guidelines provide for waiver of fees and for court-appointed counsel, which is essential to navigate expeditiously through any court procedures. To ensure confidentiality, only a sealed affidavit contains the minor's real name. She need not state her name on any other documents or during the hearing, her name should not appear in the transcript of the proceedings, and the in-chambers hearings are to be held out of the presence of unnecessary court personnel. Moreover, statewide venue is provided so that a minor need not attend court in her neighborhood.[87]

Most importantly, and following the precise lead of *Bellotti II*, the Massachusetts Rules and Guidelines set out a two-tiered approach under which judges are to determine whether to grant the petition. First the judge must determine whether the minor is mature enough to make the decision. Only if the judge determines that she is not mature, does the judge move to the second tier of inquiry, whether the abortion would be in her best interests. The Rules and Guidelines further set forth the appropriate inquiry when making these determinations,

[86] App. B at B-3, ¶ 2. Ideally, a statute should specify very short deadlines for scheduling hearings, rendering decisions, and hearing and deciding appeals in order to avoid delays such as the potential 3-week delay wrought by the Ohio statute. Ohio allows 5 business days for scheduling the initial hearing, 4 days for docketing the appeal and 5 days for the appellate hearing, and calls for decisions "immediately" after the hearing. *Akron Center for Reproductive Health* v. *Rosen*, 633 F.Supp. 1123, 1141-1142 (N.D. Ohio 1986), *aff'd*, *Akron Center for Reproductive Health* v. *Slaby*, 854 F.2d 852 (6th Cir. 1988), *jurisdiction noted*, 109 S.Ct. 3239 (1989). *Compare* La. Rev. Stat. Ann. § 40:1299:35:5 (1989 Cum. Supp.) (hearings to be held within 48 hours of filing of application, for both initial petition and appeal); Nev. Rev. Stat. Ann. § 442.255.2(c) (1986) (hearing must be held within 2 days of filing and decision rendered within 1 day of hearing), *with* Maine Acts Ch. 373 § 2 ¶ 6(C) (5 days both for initial hearing and for appeal); Wyo. Stat. § 35-6-118 (1989 Cum. Supp.) (5 days for initial hearing, no guideline for appeal).

[87] App. B at B-2, ¶¶ 2-3; B-3 to B-4, ¶¶ 4-5. Contrast with the Ohio practice, which requires a minor to provide her true name and address on the complaint. *Rosen*, 633 F.Supp. at 1143-44. Yet, even with the Massachusetts guidelines, a minor's confidentiality can be breached when persons she knows recognize her at court. *See* PPLM, *supra* n. 68, at 4.

including the minor's age, school and work experience, whether the decision is her own and whether she has discussed it with others.[88]

The Rules and Guidelines specifically caution that a judge should not question a minor in such a way as to promote "a particular set of moral values." They direct judges not to inquire into the minor's or her parents views on the morality of abortion, whether the minor considers the fetus to be an "unborn child," or whether the minor believes she is destroying life.[89]

Only if the judge fails to find the minor mature, should he or she consider whether the abortion is in the minor's best interests. The Rules and Guidelines then propose that judges apply the doctrine of "substituted judgment"[90] in conducting the best interests inquiry, explaining,

> [t]hat doctrine essentially requires a court to determine what an incompetent person would choose were she fully

[88] App. B at B-4, ¶¶ 6-8.

[89] App. B at B-4, ¶ 7. Unfortunately, in Massachusetts, and one could predict elsewhere, this guideline is far from uniformly followed. *See Planned Parenthood League of Massachusetts* v. *Bellotti*, 868 F.2d 459, 466 (1st Cir. 1989). Nevertheless, former Massachusetts Superior Court Judge Paul Garrity, who testified in *Hodgson* about his experience with the Massachusetts statute, admitted that he is personally opposed to abortion, yet he heeded the Guidelines' admonition not to let his personal views interfere. He found every minor who appeared before him mature enough to make the decision. Tr. at 1322-1325, *Hodgson*.

Other statutes' lack of standards for determining maturity and best interests are an open invitation for judges improperly to question the minor about her moral and religious views. For example, the Maine statute's catch-all provision that allows a judge to consider "[a]ny other evidence that the court may find useful," 1989 Maine Acts Ch. 573 § 2 ¶ 6(C)(3), opens the door to such improper inquiry. *See also In re T.W.*, 543 So.2d 837, 841 (Fla. App. 5 Dist. 1989) (Florida statute's lack of guidelines for determining maturity or best interests imposes clear danger that judges will render decision on basis of their own moral, religious or political beliefs rather than on a constitutionally permissible basis).

[90] *Superintendent of Belchertown State School* v. *Saikewicz*, 373 Mass. 728, 750 (1977); *Brophy* v. *New England Sinai Hosp., Inc.*, 398 Mass. 417, 431 (1986).

> competent, while bearing in mind her expressed choice and partial competency. Various considerations may be relevant to a "best interest" determination. As to this finding, the court may inquire into the minor's reasons for not seeking her parents' consent. Where the minor is accompanied by one parent who supports her petition, that support should be given great if not dispositive weight.[91]

This Guideline is, of course, critical because it ensures that a judge does not assess a minor's best interests according to the judge's moral views of abortion.[92]

If followed, rules such as the Massachusetts Rules and Guidelines can properly shield minors from harassing questions by judges, expedite the proceedings to avoid undue delay, and protect the minor's privacy and confidentiality as much as possible under the circumstances.

Conclusion

To exercise their fundamental right to reproductive choice, minors need access to reliable information about childbearing and abortion from a competent adult, including a parent, if they choose, or from trained counselors and physicians so that they may ultimately make the decision that is best for

[91] App. B at B-4 to B-5 ¶ 8.

[92] Application of the substituted judgment standard would have prevented the four-week delay in obtaining an abortion for a minor in Alabama where the judge determined that an abortion was not in her best interests because her prognosis for delivering a baby was fair! *See Ex Parte Anonymous*, 531 So.2d 901, 902-903 (Ala. 1988). The minor, 12 years old and 14-16 weeks pregnant, whose mother was in a psychiatric ward and father had left home, testified that she did not want to have the baby, could not take care of the baby or herself, and that her two aunts agreed with her decision. After finding that she was not mature, the trial judge denied her petition ruling that, at 14-16 weeks gestation, her prognosis for delivery was fair. *Id.* Although the ruling was reversed on appeal as clearly improper, four weeks elapsed during appeals to the appellate court, which remanded instead of granting the petition outright, and to the Supreme Court of Alabama.

themselves. If this Court is truly concerned with the quality of childbearing decision making by minors, it must not deter minors who will not voluntarily consult their parents from getting the counseling and health services that they desperately need for a safe abortion or a safe pregnancy. Forced parental notification or consent bars the provision of safe abortion counseling and services to those individuals who need help the most — minors who feel they cannot involve their parents in their reproductive decisions. To protect a minor's privacy, if such notification is upheld, a meaningful by-pass is required, as eight members of this Court recognized in *Bellotti* v. *Baird*. Guidelines such as those in Massachusetts provide the *minimum* essential ingredients of a meaningful, workable by-pass procedure.

For the foregoing reasons, the judgment below in *Hodgson* v. *Minnesota* should be reversed in part, and the judgment in *Ohio* v. *Akron Center for Reproductive Health* should be affirmed.

Respectfully Submitted,

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APPENDIX A

Interests of Amici

The Center for Population Options (CPO) is a national, non-profit organization dedicated to the prevention of unintended adolescent pregnancy and too-early childbearing. CPO develops programs to increase opportunities for young people through education, comprehensive health care, and access to family planning services.

Planned Parenthood League of Massachusetts, Inc. is a non-profit organization which, with others, is the certified class representative of minor women who are engaged in an ongoing challenge to the Massachusetts minors' abortion parental consent/judicial by-pass statute, Mass. Gen. L. Ch. 112, §12S, which has been in effect longer than any other such statute in the nation, and which was enacted in direct response to the striking down of the predecessor §12S by the Court in *Bellotti* v. *Baird*.*

Girls Clubs of America serves more than 250,000 girls and young women ages 6-18 nationally through programs and advocacy. Preventing adolescent pregnancy is an important goal of the organization. A major objective of its program in this area is to improve communications between parents and their daughters.

The Massachusetts Judicial Consent for Minors Lawyer Referral Panel is a volunteer association of over two hundred Massachusetts lawyers who for the last eight years have represented more than 6,000 pregnant minors seeking judicial consent for an abortion (in lieu of parental consent) under Mass. Gen. Laws ch. 112, §12S.

Mobilization for Youth Health Services, Inc. is concerned that the erosion of *Roe* v. *Wade* will lead us back to the days where social class and ability-to-pay were highly determina-

* 443 U.S. 622 (1979) *(Bellotti II)*. The history of the new §12S and the litigation challenging it is set forth in part in *Planned Parenthood League of Massachusetts* v. *Bellotti*, 868 F.2d 459 (1st Cir. 1989).

minative of whether choice was available and, if available, whether that choice was exercised under conditions of hygiene, care, and skill normally accepted as standard for the medical profession. Social realities being what they are, the victims of the curtailment of an essential right for women would be millions of disadvantaged and poor women in the United States.

The United States Student Association (USSA) is a nationwide non-profit membership organization which represents approximately two million students at approximately 200 colleges and universities throughout the United States. USSA has a strong commitment to ensuring access to higher education and the right to self-determination for all individuals regardless of age, gender, economic status, race, disability, sexual/affectional orientation, or veteran status.

Brooklyn YWCA (Young Women's Christian Association) is part of the oldest and largest worldwide women's membership organization dedicated to empowering women. The Brooklyn YWCA opposes any effort to restrict the access of poor and young women to quality health care services, as well as any attempt to deny them their right to reproductive freedom.

Students and Youth Against Racism is a national organization based in New York City with chapters nationwide whose women members include students and youth from many communities. It supports the right of all young women to make the decision to terminate a pregnancy through abortion, without restrictions, if they so choose. To deny safe, legal abortion would seriously harm the health of and discriminate against untold numbers of young women, especially the poor, unemployed, and Black, Latino, Asian and Native Americans, who, without the funds to obtain safe abortions, would have to resort to dangerous health-threatening procedures.

Professor William Kassen, a child psychologist at Yale University, is a member of the National Academy of Sciences and the vice chairman of the Committee on Child Development Research and Public Policy that proposed and contributed to the report *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing.*

The American Public Health Association, established in 1872, is a national nongovernmental professional society representing 55,000 members in all disciplines and specialities in public health. APHA is devoted to the universal protection and promotion of public health, and the equality of health services for all persons.

The National Family Planning and Reproductive Health Association, Inc. (NFPRHA) is a non-profit membership corporation designed to improve and expand the delivery of comprehensive family planning and reproductive health care information and services throughout the United States. NFPRHA represents over 85 percent of the agencies and organizations that operate family planning programs with funds received under Title X of the Public Health Services Act of 1970.

Abortions Rights Mobilization (ARM) is a Section 501(c)(3) organization, which uses lawsuits, education and other techniques "to implement and guarantee a women's right to legal abortion as decreed by the U.S. Supreme Court," following ARM's by-laws.

Abortion Rights Council (ARC) was founded in 1968 and currently has 5,000 members and 12,000 supporters in the State of Minnesota. It has as its sole purpose keeping abortions safe and legal for all women. ARC opposes any further restrictions on women's access to abortions and supports the principles established in *Roe* v. *Wade*.

Choices Women's Medical Center is a New York State licensed medical facility serving over 30,000 patients a year in the New York City area for family planning, abortion and prenatal care. Since its founding in 1971, Choices Women's Medical Center has been at the forefront of insuring high quality feminist women's health care to its patients and fighting politically to retain the right to choose.

Child Care Law Center in San Francisco, California is the only legal services organization in the country exclusively dedicated to expanding the supply of affordable, quality child care. It has a particular emphasis on serving the needs of low-income women, and as such it strongly supports the rights of low-income women to have equal access to health services, including abortion.

The National Organization for Women (NOW) is the largest feminist organization in the United States. Fundamental to NOW's purpose is the right of women to control their own bodies and to determine if and when to bear children. Women's right to reproductive freedom impacts not only their right to privacy, but also their health and safety.

The American Association of University Women (AAUW), a network of 140,000 college-educated women, promotes equity for women and girls. The AAUW supports the right of every woman and girl to safe and comprehensive reproductive health care. AAUW believes that decisions concerning reproductive health care are personal ones, and that the right to make informed decisions should be available to *all* women.

The American Jewish Congress, an organization of American Jews founded in 1918, is fully committed to protecting the right of all women to exercise reproductive choices. While it believes that involving parents in the choices of their teenage daughters is desirable, it believes that such involvement cannot be mandated by law, because study after study demonstrates that these laws are wholly ineffective, even, in many cases, counterproductive.

The National Council of Jewish Women, founded in 1893 and numbering 100,000 members across the United States, is dedicated, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. It has adopted a National Resolution to work for "the protection of every female's right to choose abortion, and the elimination of obstacles that limit reproductive freedom."

The Women's Law Project (WLP) is a non-profit law firm dedicated to advancing the status and opportunities of

women. WLP believes that the right to reproductive choice is an essential component of women's ability to play an equal role with men in this society, and has engaged in extensive litigation and public education designed to protect women's legal right to abortion.

The Women's Action Alliance, Inc. in New York City works extensively with community-based organizations serving women of color, young women, and low-income women. We are keenly aware of the importance of maintaining a full range of reproductive options for these and all women. If abortion services or access to abortion were to be restricted, these women would have no alternative but to seek dangerous alternatives to safe and legal abortion.

The National Gay & Lesbian Task Force (NGLTF) is a national membership advocacy and political organization founded in 1973, to protect and advance the civil and social rights of lesbians and gay men. NGLTF strongly supports the reproductive freedom of all women and the expansion of a fundamental right to privacy of all people in the area of reproductive and sexual decision-making.

The National Gay Rights Advocates (NGRA) is a non-profit public-interest law firm founded in 1978, which engages in impact litigation throughout the country on behalf of lesbians and gay men. Preserving the constitutional rights to liberty and privacy, rights that are principal components of a woman's right to choose abortion, are of fundamental concern to NGRA's work and its membership.

Lambda Legal Defense and Education Fund, Inc., founded in 1973, is the nation's oldest and largest national legal advocacy organization working in furtherance of the rights of lesbians and gay men. As an organization representing the lesbian and gay community's belief in the constitutional right to liberty and bodily autonomy, Lambda strongly supports the position that women in our society are constitutionally entitled to make their own decisions about whether to choose abortion.

The National Council for Research on Women is an independent association of established centers and organizations that provide institutional resources for feminist research, policy analysis, and educational programs for women and girls.

The Minority Prison Project of Memphis, Tennessee works for the protection of the men, women, and children imprisoned in the United States. We work to try and regain the rights for these humans, under the Constitution, that is denied them daily.

All-Peoples Congress, based in New York City, is a national organization with chapters in communities in many major cities whose women members are Black, Latino, Asian, Native, white, students, lesbians, workers, unemployed, disabled, seniors, single heads of households and those on fixed incomes. It strongly supports a comprehensive federal program of guaranteed reproductive rights and health care for all women, which includes safe, legal, affordable abortion.

The Women's Bar Association of Massachusetts (WBA), with over 1,000 members, is committed to the advancement of women attorneys, to the protection of all women in the legal system, and has been particularly concerned with the protection of a woman's right to choice. The WBA also sponsors a panel of attorneys who represent minors seeking judicial consent for abortion (amicus Massachusetts Judicial Consent for Minors Lawyer Referral Panel).

California Women Lawyers (CWL) is an organization of several thousand women lawyers founded in 1973 for the primary purpose of improving the situation of women in the State of California. CWL is committed to all issues affecting a woman's right to choice, lobbying against various parental consent bills and working with a broad-based coalition to encourage funding and support for programs supportive of choice.

The Women's Bar Association of Illinois ("WBAI") was founded in 1914 for the purpose of promoting and fostering the interests and welfare of women and women attorneys and

to maintain the honor and dignity of the legal profession. WBAI's 1,000 members have long campaigned for individual rights and liberties, including the right of women to make reproductive decisions free from governmental interference.

Women Lawyers' Association of Los Angeles (WLALA), founded in 1919, is the largest local bar association in the State of California emphasizing the concerns of women. WLALA has as members over 1,200 female and male lawyers, judges, and law students who are personally and professionally concerned with the importance of preserving a woman's right to choose for herself whether to terminate a pregnancy.

The New York State Coalition Against Domestic Violence is a membership organization of battered women's shelters, safe home projects, counseling and advocacy organizations and individuals committed to empowering women and helping them to lead violence-free lives. The Coalition believes in women's rights to choice and in the accessibility of services to all women, regardless of economic status. This includes every woman's right to reproductive choice and to medical assistance.

The Tucson Women's Commission was founded in late 1975 by the Mayor and Council of the City of Tucson to assist women in attaining full equality of opportunity in all aspects of life. The Tucson Women's Commission also maintains that public policy in the best interest of women will support a full range of options, information, and services so that every woman has the ability to make her own decision about when, whether, and under what conditions to bear a child.

New York Women in Criminal Justice is an organization of women whose members include police, probation, and correction officers; judges, attorneys, and social workers; others who work in the criminal justice system; inmates and ex-offenders. In furtherance of our concern that offenders who go through the system not come out worse than when they went in, we strongly support the right of a woman to choose abortion, knowing that the offspring of women in prison become the

dysfunctional children in school and often the criminals of the future.

The Missouri Women's Network is a banding together of Missouri organizations and individual women and men to facilitate communication, promote education, and to strengthen advocacy for women's issues based on the 1977 National Plan of Action for Women (adopted in Houston).

The Connecticut Women's Educational and Legal Fund, Inc., with over 400 members, is a non-profit public interest law firm advocating for women's rights. As an organization working for equality, we believe that every woman, without regard to age, religious belief, income, race or disability, must be able to control her own health and reproduction.

Hawaii Women Lawyers is dedicated to the improvement of the status of women attorneys and the support of issues of concern to all women, so as to promote the advancement of all women.

North Carolina Equity, a non-profit organization, is dedicated to the economic advancement of women. We support women's full realization and exercise of their most basic legal rights, including a woman's right to control her own body. This right must include her right to choose an abortion.

The San Francisco Women Lawyers Alliance is a progressive, activist bar organization that was founded in 1983 to provide a vehicle through which women lawyers could address women's issues and enhance the position of women in our society. One of the issues of particular concern to our membership is freedom of choice and reproductive rights for all women.

Queen's Bench of the San Francisco Bay Area, founded in 1912, is the largest bar association in the Northern California area established to promote the interests of women attorneys. Queen's Bench is concerned in maintaining a woman's fundamental right of choice to terminate a pregnancy that was established in *Roe* v. *Wade*.

Fresno Free College Foundation is a community organization with offices in Fresno, California. Its origin in 1968 is connected to an academic freedom case and, since that time, it has, in various ways, been supportive of academic freedom and the civil liberties of students, professors, and citizens.

APPENDIX B

STANDING ORDER 5-81. UNIFORM PROCEDURES REGARDING PETITIONS FOR ABORTION AUTHORIZATION UNDER G.L. c. 112, s. 12 TO INCLUDE AS AN ATTACHMENT SUGGESTED GUIDELINES, ORIGINALLY SET FORTH IN *PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS* v. *BELLOTTI*, NO. 81-124 CIVIL (SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY; LIACOS, J. SINGLE JUSTICE) (JUNE 16, 1981)

(Amended)

Applicable to All Counties

Effective August 1, 1981

(1) Upon the filing of a petition or motion (petition) under G.L. c. 112, § 12S, inserted by St.1980, ch. 240 (a copy of which is attached), the Clerk-Magistrate (clerk) shall immediately bring the matter to the attention of the Regional Administrative Justice or His/Her Designee who will either hear the petition in his/her session or, through the clerk, assign it for a hearing in another session.

In any event, the matter shall be given priority over all other cases then pending "so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman." G.L. c. 112, § 12S, inserted by St.1980, ch. 240. In this regard, the court should not decline to decide a case brought under § 12S because of any pleading omissions or other technical defects and shall assist the minor, particularly if unrepresented by counsel, in presenting relevant facts and by liberally construing the pleadings. (A copy of a form petition, which is to be made easily available to petitioners, is attached.)

If the position is filed in a county in which no session is being held, the clerk of court who received the petition shall immediately notify the Chief Justice of the Superior Court by telephone of the pending petition. The Chief Justice shall then take such action as is necessary to reach a decision promptly

and without delay so as to serve the best interests of the pregnant woman.

(2) Although § 12S permits a pregnant woman less than eighteen years of age to participate in proceedings in the Superior Court Department in her own behalf, it is preferable that the minor be represented by counsel. The statute requires that the court advise her that she has a right to court-appointed counsel and that the court shall, upon her request, provide her with such counsel.

Also, the court may appoint a guardian *ad litem* to represent the minor or may make such other orders as necessary pursuant to Mass.R.Civ.P. 17(b). The compensation for counsel and/or for the guardian *ad litem* shall be certified by the justice as an expense incident to the operation of the court. If the minor requests waiver of costs and fees, as provided by St.1980, c. 539, such costs and fees are to be waived.

(3) As provided by § 12S, all proceedings shall be confidential and all pleadings and other papers filed shall be designated anonymously. For example, the proceedings shall be titled Mary Moe, Mary Doe, etc. If the minor files papers which do not insure her anonymity, the court shall have the papers processed in a manner which will insure anonymity and shall return the defective papers to the minor or her counsel. An affidavit shall accompany the papers in the case. Such affidavit shall reveal the minor's true identity. The affidavit shall be sealed in an envelope which will be identifiable by having the docket number of the case inscribed upon it. All such envelopes shall be kept in a separate file by the clerks of the various courts. All papers in the proceeding shall be impounded.

The clerks of the various courts should undertake to insure that the minor's contact with the clerk's office is confidential and expeditious to the fullest extent practicable. For example, assistance in filing a petition should be provided in a confidential setting, such as a private office. Similarly, one or more persons in the clerk's office should be at all times available to

answer questions asked by a minor, either in person or by phone, and to assist the minor in expeditiously presenting her petition to the court. Each clerk shall designate one or more persons to receive and process § 12S petitions and shall insure that one such person is available to insure prompt treatment.

(4) All proceedings under c. 112, § 12S, shall be conducted jury-waived with a court reporter present. The statute requires the court to make in writing specific factual findings and legal conclusions supporting his or her decision and to order that a record of evidence be maintained which includes his or her own findings and conclusions.

(5) Suggested guidelines, originally emanating from a memorandum of the Single Justice for Suffolk County in *Planned Parenthood League of Massachusetts* v. *Bellotti*, No. 81-124 Civil (Supreme Judicial Court for Suffolk County; Liacos, J. Single Justice) (June 16, 1981), are attached hereto.

SUGGESTED GUIDELINES

The following guidelines for handling § 12S petitions ("petitions") are suggested to the Superior Court. These guidelines are intended to supplement amended Superior Court Standing Order No. 5-81 and not to replace it.

1. Petitions should ordinarily be heard on any day the court is in session.

2. Petitions should be heard as expeditiously as possible upon filing with the Clerk/Magistrate's office, and on the same day if practical.

3. All technical defects in the proceedings and in the pleadings and papers should ordinarily be disregarded by the Court and by the Clerk/Magistrate.

4. Hearings must be confidential and should be held in the judge's lobby except where physically impossible. The petitioner ("minor") should be permitted to have present any person she desires (social worker, counselor, parent, friend), but the judge should exclude all unnecessary court personnel or others. The minor should be free to choose whether to go forward without counsel.

5. The minor should not be required to state her true name. After explaining the impoundment procedures used to ensure confidentiality, the judge may wish to ask the minor her true first name in order to address her by it during the hearing. The transcript should not contain the minor's full true name since she will have previously stated her identity on a sealed affidavit held by the Clerk/Magistrate pursuant to Superior Court Standing Order 12-80.

6. It is contemplated that the judge will conduct the hearing on a "two-tier" basis with "maturity" determined first, and "best interest" addressed only if maturity is not found.

7. As to the "maturity" finding, inquiry may be appropriate in such areas as the minor's age and school and work experience, any history of mental illness or other treatment relating to mental competence, and whether the abortion decision is a personal decision and not one forced upon the minor by another and whether the minor has discussed her decision with other persons. In any inquiry as to the minor's maturity and her understanding of the nature, consequences and significance of her abortion choice, or in any inquiry as to her best interests, it is suggested that the judge should avoid the creation of the appearance of seeking to promote a particular set of moral values by inquiring into the minor's or her parents' views as to the morality of abortion; or into whether the minor considers a fetus to be an "unborn child," as to whether the minor believes she is in some way taking or destroying life.

8. Where the court finds a minor is not mature, it must make a determination of whether the abortion or childbirth alternative is in her "best interest". The court may be guided in making such a determination by the substantially coextensive doctrine of substituted judgment. That doctrine essentially requires a court to determine what an incompetent person would choose were she fully competent, while bearing in mind her expressed choice and partial competency. Various considerations may be relevant to a "best interest" determination. As to this finding, the court may inquire into the minor's

reasons for not seeking her parents' consent. Where the minor is accompanied by one parent who supports her petition, that support should be given great if not dispositive weight.

9. Where the court preliminarily concludes that the minor is mature, appointment of a guardian ad litem should ordinarily be unnecessary. Where the court preliminarily concludes that the minor is not fully mature, it should consider whether such an appointment is necessary to assure protection of the minor's best interest or whether it would lead to unnecessary delay, particularly if the minor is represented by counsel, or has been counseled by competent professionals, or is accompanied by a parent or other adult.

10. In view of the statutory mandate for expeditious decisions, petitions may be decided in chambers and should, in any event, be decided as promptly as possible, and ordinarily within twenty-four hours or less. The Clerk/Magistrate should inform the minor of the decision as soon as possible and in the manner which the minor requests.

11. The Judge or Clerk/Magistrate should give the minor a copy of an order under § 12S bearing the court's docket number, and a copy of her sealed affidavit bearing the same docket number. Where the decision can be made immediately, the Judge may choose to have the minor wait, deliver the order and a copy of the affidavit to her, and seal the original affidavit in her presence.

12. A petition should not be denied or a hearing delayed solely because the minor has not selected a particular clinic, hospital or doctor for performance of the abortion. If the judge authorizes an abortion for an immature minor on the "best interest" basis, he may inquire into her contemplated plans in order to assure himself that the particular course of medical treatment she intends to follow will be in her best interests.

13. Appointed counsel in § 12S proceedings should be paid for in the same fashion as in criminal cases or in such other fashion as the Chief Administrative Justice of the Trial Court finds is best suited for such proceedings.

AMICUS CURIAE

BRIEF

IN THE

Supreme Court of the United States

October Term, 1989

Supreme Court, U.S.
FILED
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BERNARD J. TURNOCK, M.D., M.P.H., Director of the Illinois Department of Public Health, et al.,

Appellants,

v.

RICHARD M. RAGSDALE, M.D., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Do the Illinois, Minnesota and Ohio statutes at issue violate the establishment clause by endorsing one religious theory of when life begins?

2. Do the Illinois, Minnesota and Ohio statutes at issue impose an impermissible burden on a woman's free exercise of religion by restricting her fundamental religious interest in deciding whether to continue a pregnancy?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	2
STATEMENT OF THE CASE	4
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. ABORTION IS AN ISSUE IMPLICATING DEEPLY HELD RELIGIOUS BELIEFS AND IS THE SUBJECT OF ONGOING RELIGIOUS DEBATE	6
II. THE STATUTES AT ISSUE VIOLATE THE ESTABLISHMENT CLAUSE	12
A. The Establishment Clause Requires Government Neutrality Concerning Religion	12
B. The Statutes At Issue Establish Religion	13
III. THE CHALLENGED STATUTES IMPOSE AN IMPERMISSIBLE BURDEN ON A WOMEN'S FREE EXERCISE OF RELIGION	18
A. For Many Women, the Decision Whether To Terminate a Pregnancy Is an Issue of Fundamental Religious Belief	19
B. Statutes Regulating Abortion Affect Fundamental Religious Interests And Are Subject To Strict Scrutiny	20
C. The Challenged Statutes Significantly Burden the Free Exercise of Religion	21
D. The Challenged Statutes Do Not Serve Any Compelling State Interests Which Would Justify Incursions in Religious Liberty	24
CONCLUSION	26

TABLE OF AUTHORITIES

CASES:	PAGE
Aguillard v. Edwards, 107 S. Ct. 2573 (1987)	16
Akron Center for Reproductive Health v. Rosen, 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd sub nom. Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988)	15, 16, 25
Allegheny County v. Greater Pittsburgh ACLU, 109 S. Ct. 3086 (1989)	2, 12, 15, 17, 18
Bellotti v. Baird, 443 U.S. 622 (1979)	22
Bowen v. Kendrick, 108 S. Ct. 2562 (1988)	3
Carey v. Population Services International, 431 U.S. 678 (1977)	19
City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)	19, 21, 22
Eisenstadt v. Baird, 405 U.S. 438 (1972)	19, 20
Engel v. Vitale, 370 U.S. 421 (1962)	17
Epperson v. Arkansas, 393 U.S. 97 (1968)	17
Everson v. Board of Education, 330 U.S. 1 (1947)	12, 18
Frazee v. Illinois Dept. of Employment Security, 109 S. Ct. 1514 (1989)	3
Grand Rapids School District v. Ball, 473 U.S. 373 (1985)	17
Griswold v. Connecticut, 381 U.S. 479 (1965)	18, 20
Hazelwood v. Kuhlmeier, 108 S. Ct. 562 (1988)	23
Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987)	20, 21, 22
Hodgson v. State of Minnesota, 648 F. Supp. 756 (D. Minn. 1986), *rev'd*, 853 F.2d 1452 (8th Cir. 1988)	15, 16, 22, 23, 25
Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)	17
Lemon v. Kurtzman, 403 U.S. 602 (1971)	12, 16
Lynch v. Donnelly, 465 U.S. 668 (1984)	12, 13
Maher v. Roe, 432 U.S. 464 (1977)	4
McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y.), *rev'd sub nom. Harris v. McRae*, 448 U.S. 297 (1980)	9, 10
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Ragsdale v. Turnock, 625 F. Supp. 1212 (N.D. Ill. 1985), *modified*, 841 F.2d 1358 (7th Cir. 1988)	14, 16, 22, 26
Roe v. Wade, 410 U.S. 113 (1973)	*passim*
Roemer v. Board of Public Works, 426 U.S. 736 (1976)	16

PAGE

CASES:

School District of Abington Township v. Schempp, 374 U.S. 203 (1963) 12, 18
Sherbert v. Verner, 374 U.S. 398 (1963) 20, 21
Skinner v. Oklahoma, 316 U.S. 535 (1942) 20
Stanford v. Kentucky, 109 S. Ct. 2969 (1989) 23, 24
Texas v. Johnson, 109 S. Ct. 2533 (1989) 4, 21
Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981) 20, 21
Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) 3, 19
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 23
United States v. Ballard, 322 U.S. 78 (1944) 18
Wallace v. Jaffree, 472 U.S. 38 (1985) ... 13, 14, 16, 18, 20
Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) ..... *passim*
Wisconsin v. Yoder, 406 U.S. 205 (1972) 20, 22

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M. D. Bial, *Liberal Judaism At Home: The Practices Of Modern Reform Judaism* (rev. ed. 1971) 9
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Catholics For A Free Choice, Brief *Amicus Curiae*, *Webster v. Reproductive Health Services* 11
Covenant And Creation: Theological Reflections On Contraception And Abortion (adopted by the 195th General Assembly of the Presbyterian Church) (1983) .. 11
The Declaration on Abortion of the Sacred Congregation for the Doctrine of the Faith of November 18, 1974 (issued by the Roman Catholic Church) 11
Declaration on Religious Liberty (Vatican II *Dignitatis Humanae* 7, December 1965) 3
H. Donin, *To Be A Jew: A Guide To Jewish Observance In Contemporary Life* (1972) 7
D. Feldman, *Birth Control In Jewish Law: Marital Relations, Contraception and Abortion* (1968) 7, 8
Freedom of Choice Concerning Abortion (adopted by the General Synod of the United Church of Christ) (June, 1971) 10

PAGE

CASES:

Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 2nd Sess. 335 (March 24, 1976) 8, 9
C. Jacquet, ed., *Yearbook of American and Canadian Churches* (1984) 7
S. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984) 6, 19
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A Priest on Abortion: Women as the Proper Moral Agent, Los Angeles Times, August 6, 1989, Part V, at 1, col. 1 25
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CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment I ..... *passim*

No. 88-790; No. 88-805; Nos. 88-1125, 88-1309.

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CONSENT OF THE PARTIES

All parties have consented to the filing of this brief and their letters of consent are being filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

This consolidated Brief *Amici Curiae* is submitted in support of appellees Richard M. Ragsdale and Akron Center for Reproductive Health, and appellant Jane Hodgson.

The Anti-Defamation League of B'nai B'rith ("ADL") is a national Jewish human relations organization dedicated to principles of religious and individual liberty including the right to privacy. ADL views abortion as an issue of personal and religious freedom. Accordingly, it believes that a woman's decision to have an abortion is constitutionally protected, with due regard for the right of women to exercise freely their own religious beliefs and not be constrained by the religious beliefs of others which have been given the sanction of state law. ADL recognizes that various religious faiths and denominations hold divergent views about abortion. In light of this multiplicity of views, ADL believes that no single religious group's beliefs should be legislatively established. Rather, individuals should be permitted broad latitude in deciding for themselves, in accordance with their own religious and moral convictions, whether to continue a pregnancy to term. Thus, ADL views most forms of government interference with an individual's exercise of religious conscience on the question of procreative choice, before viability, including those here at issue, to be unconstitutional under the First and Fourteenth Amendments. For these reasons, ADL supports the principles established in *Roe v. Wade*, 410 U.S. 113 (1973), and opposes erosion of the fundamental rights secured by that decision. ADL believes the Minnesota and Ohio parental notification requirements and Illinois' licensing scheme violate constitutionally protected principles of privacy, free exercise and establishment.

ADL has previously filed briefs in this Court in numerous cases dealing with First and Fourteenth Amendment principles, including *Allegheny County v. Greater Pittsburgh ACLU*, 109 S. Ct. 3086

(1989); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988); *Frazee v. Illinois Dep't of Employment Sec.*, 109 S. Ct. 1514 (1989); and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). Thus, the Anti-Defamation League is able to bring its special expertise relating to religious liberty and its experience advocating religious freedom to the issues raised on these appeals.

B'nai B'rith Women is an organization of 120,000 Jewish women who, since 1968, have advocated the right of women to choose for themselves on matters of reproduction. As members of a minority religion, BBW members are especially sensitive to keeping the state from restricting religious freedom, and as women BBW members have particular concerns about preserving their rights. Basic to the rights of every woman is that of deciding when and whether to have children, and so BBW firmly supports upholding these rights as outlined in *Roe v. Wade*.

Catholics for a Free Choice is an independent national membership organization established in 1974. One of CFFC's objectives is to protect the legal right of all women and girls to act as moral agents in decisions related to sexuality and reproductive health care without coercive legal or quasi-legal interference by religious institutions. As Catholics, CFFC members support policies of strict separation of church and state based not only on the U.S. Constitution but also on the Roman Catholic *Declaration on Religious Liberty* (Vatican II *Dignitatis Humanae* 7, December 1965) which declares:

> [T]he civil authority must see to it that the equality of the citizens before the law, which is itself society, is never violated either openly or covertly for religious reasons and that there is no discrimination among its citizens.

Women's American ORT has long held a pro-choice position on the issue of reproductive freedom, and believes that any erosion of the rights articulated in *Roe v. Wade* will be corrosive to fundamental individual liberties. Women's American ORT, and its 145,000 members, believe that when and whether to bear a child is a woman's private decision and opposes attempts to narrow the opportunity for women to control their own lives and be free from all levels of governmental intervention.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth by the appellees in *Turnock v. Ragsdale*, No. 88-790 and *State of Ohio v. Akron Center for Reproductive Health*, No. 88-805, and by appellants in *Hodgson v. State of Minnesota*, Nos. 88-1125 and 88-1309.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to continue a pregnancy to term. The doctrine of *Roe v. Wade* "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Maher v. Roe*, 432 U.S. 464, 473-74 (1977). *Roe v. Wade* and its progeny effectuate the constitutional guarantee that in making critical, private decisions, a woman must be permitted to exercise her personal and religious conscience without state interference.

Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), does not, by its terms, overrule *Roe v. Wade*. However, as Justice O'Connor expressly noted in her concurring opinion, and as the plurality indicated, while the Court deliberately chose not to overrule *Roe*, the various opinions are clearly an effort to reexamine its constitutional validity. *Webster*, 109 S. Ct. at 3060 (O'Connor, J., concurring). Moreover, by upholding the state statute challenged in *Webster*, this Court has dangerously narrowed the principles set forth in *Roe v. Wade*. Further, the various opinions have created uncertainty as to the appropriate standard of review.

Amici believe that the Court's decision in the three cases before it today will determine whether the constitutional guarantees recognized in *Roe v. Wade* will retain any vitality. As this Court has recognized, most recently in *Texas v. Johnson*, 109 S. Ct. 2533 (1989), the Constitution requires the Court to apply a strict scrutiny analysis to all cases impinging on First Amendment rights. Under this principle, the statutes at issue are unconstitutional under both the establishment and free exercise clauses.

These statutes place significant and direct burdens upon the exercise of the right to have an abortion and directly contravene the principles of *Roe v. Wade*. The Illinois statutory and regulatory scheme sets forth complex and oppressive regulations for the operation of private clinics in which abortions may be performed, and effectively regulates such clinics out of business. Parental notification statutes, such as the Minnesota and Ohio statutes, are designed to frustrate the decision to terminate a pregnancy and cause teenagers to delay abortions. This statutorily-imposed postponement of the abortion decision until a later, more dangerous time, and the concomitant creation of greater emotional turmoil and stress, impermissibly burden the right to choose whether to terminate or continue a pregnancy.

Although the protections in *Roe v. Wade* are grounded in the constitutionally-based right of privacy, the 7 to 2 majority in *Roe* recognized the religious nature of the abortion decision. *See Roe*, 410 U.S. at 150. More recently, Justice Stevens acknowledged the religious component in *Webster*, when he argued that the establishment clause of the First Amendment is also implicated by any state-imposed burden upon a woman's right to make, and implement, her own choice with respect to the termination of a pregnancy. 109 S. Ct. at 3081-82 (Stevens, J., concurring in part and dissenting in part). Any erosion of the principles articulated in *Roe v. Wade* damages not only the privacy interests at stake but also implicates religious freedoms.

Clearly, a woman's religious beliefs often play a major role in shaping her views about abortion. The religious component of the decision—and of the debate surrounding whether abortion should be allowed or not—is attested to by the fact that 67 religious organizations submitted their views as *amici curiae* in *Webster*. When a state creates significant obstacles to abortion, it effectively establishes one view on abortion, and unduly burdens the free exercise of religious conscience by those holding other views. The First Amendment does not permit such an establishment or tolerate such undue burdens absent a compelling state interest; in the conflict between dictates of law and dictates of conscience, freedom to pursue religious practice must prevail. As *Amici* will demonstrate below, freedom of religion is predicated on protecting matters of

individual conscience such as whether or not to terminate a pregnancy

In Section I of this brief, *Amici* establish the religious nature of the abortion decision and demonstrate the multiplicity of religious views on abortion. Section II demonstrates that the Illinois, Ohio and Minnesota statutes promote a particular religious view, without advancing an articulable secular purpose, thus violating the establishment clause. Section III argues that these statutes also violate the free exercise clause because they cut deeply into fundamental religious rights, while failing to advance any of the interests they were purportedly designed to serve. For these and other reasons, these statutes are unconstitutional.[1]

ARGUMENT

I. ABORTION IS AN ISSUE IMPLICATING DEEPLY HELD RELIGIOUS BELIEFS AND IS THE SUBJECT OF ONGOING RELIGIOUS DEBATE

The decision to terminate a pregnancy is profoundly personal. An unwanted pregnancy affects every aspect of a woman's life, from her physical health and emotional well-being to her social relationships and economic standing. Moreover, the physical burdens imposed by pregnancy may also affect a woman's ability to provide emotional and financial care to her family. Accordingly, a woman's abortion decision must be guided by her unique personal circumstances, and not by the government. *See* S. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1017 (1984); Cates, *Legal Abortion: The Public Health Record*, 25 Science 1587, 1589 (1982).

For many women, religious beliefs pervade the decision whether to continue or terminate a pregnancy. When life begins is a theological question—a matter of belief and personal conviction. As this Court recognized in *Roe*,

[1]*Amici* are aware that both the parties and certain other *amici* briefs filed on the same side develop the privacy analysis at great length, and therefore *Amici* note their support for the position taken in those briefs. *Amici* submits this brief limited to a discussion of an issue about which it has special expertise and interest—the impact of the Court's decision in these three cases on freedom of religion.

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

410 U.S. at 159. No uniform theological view exists on the question of when human life begins or on the morality of abortion. Indeed, "the intensely divisive character of much of the national debate over the abortion issue reflects the deeply held religious convictions of many participants in the debate." *Webster*, 109 S. Ct. at 3085 (Stevens, J., concurring in part and dissenting in part). In the United States alone, there are over 200 religious groups and denominations, a majority of whom have a position on the morality of abortion. *See* C. Jacquet, ed., *Yearbook of American and Canadian Churches* (1984).

The Anti-Defamation League, B'nai B'rith Women and Women's American ORT, whose constituents represent different religious views on the issue of abortion, bring a personal interest and knowledge about Jewish positions on this issue to the debate. According to Jewish law, the fetus is not considered a human being and has no juridical personality until after its birth. For this reason, many Jews do not equate abortion with murder. Indeed, in certain circumstances, Jewish law views abortion not only as a permissible choice for a woman, but also as her religious and moral duty. *See* H. Donin, *To Be A Jew: A Guide to Jewish Observance in Contemporary Life* 140-141 (1972) ("[a]ll halakhic scholars agree that therapeutic abortions—namely, abortions performed in order to preserve the life of the mother— are not only permissible but mandatory."); D. Feldman, *Birth Control In Jewish Law: Marital Relations, Contraception And Abortion* 284 (1968) ("therapeutic abortion. . . is mandated by the Mishnah. . ."). [2]

Beyond this general consensus, however, different branches of Judaism, and different groups within each branch, disagree about the legal and moral status of abortion and about the specific circumstances under which it is permitted or required. Within the different

[2]The *Mishnah* is a compilation of oral Jewish law collected about A.D. 200 into a work known as the *Talmud*.

strands of Orthodox Judaism, for example, debate persists about the permissibility of therapeutic abortions in situations deleterious to the health of the mother, but not life-threatening, and in situations where there is a grave risk to her mental health. *Id.* at 284-294.

Most Orthodox Jewish groups have traditionally opposed abortion except in pressing situations, such as the endangerment of the mother's life. *Id.* at 275-283. Still other Orthodox Jews emphasize the physical and mental health of the woman as the paramount concern. "[T]he woman's pain 'comes first'. . . considered ahead of the husband's interest in his future child *and* ahead of the potential life of the child itself." *Id.* at 291 (emphasis in original). These groups believe that "insanity constitutes a danger to life and accordingly permit[ ] an abortion when it is feared that the mother may otherwise become mentally deranged." J.D. Bleich, *Contemporary Halakhic Problems* 363 (1977). Further, they counsel that an abnormal fetus may constitute "a grave necessity" in certain instances which would mandate an abortion (for example, if the possible abnormality of the fetus causes great mental anguish to the mother). *Id.* at 367. Finally, such Orthodox groups permit abortion when the pregnancy is the result of rape. D. Feldman, *supra*, at 287.

The Conservative, Reform and Reconstructionist branches of Judaism view abortion differently from many of their Orthodox counterparts and from each other. These branches sanction a woman's decision to terminate a pregnancy and endorse the holding of *Roe v. Wade*. Rabbi Balfour Brickner, Senior Rabbi of the Stephen Wise Free Synagogue and former director of the New York Federation of Reform Synagogues, notes that Reform Jewish thought is in accord with *Roe v. Wade*'s holding that: "The Constitution does not define 'person' in so many words. The use of the word is such that it has application only post-natally." *Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2nd Sess. 335 (March 24, 1976) (Rabbi Brickner, statement on behalf of the Religious Coalition for Abortion Rights) (citing *Roe v. Wade*, 410 U.S. at 157).

Similarly, the official Conservative Jewish position paper, recently issued, endorses the *Roe v. Wade* guarantees:

> Conservative Judaism continues to affirm its strong support for the 1973 Supreme Court decision of *Roe v. Wade*. Any weakening, limitation, or withdrawal of the *Roe v. Wade* decision is sure to produce tragic consequences. In light of the recent Supreme Court decision, we must be diligent in our efforts to safeguard and preserve the full personal and religious freedom given to the American people.

A Statement On Abortion (issued by the Social Justice Committee of the Rabbinical Assembly) (July, 1989).

Even among these Jewish groups, however, there is disagreement on the rationale for upholding a woman's right to terminate a pregnancy. Under certain circumstances, such as when a pregnancy threatens a woman's life, as the Orthodox view counsels, or where necessary to preserve a woman's health, Jewish law may compel termination of a pregnancy. *See McRae v. Califano*, 491 F. Supp. 630, 696 (E.D.N.Y.), *rev'd sub nom. Harris v. McRae*, 448 U.S. 297 (1980) (citing testimony of Rabbi David Feldman). Others would protect a woman's right to choose an abortion as the exercise of her own religious and moral convictions. See M.D. Bial, *Liberal Judaism At Home: The Practices Of Modern Reform Judaism* 13 (1971).

Many Reform Jews base their support of a woman's right to have an abortion before a fetus is viable on the belief that a woman should have control over her body. *Id.* at 13. Others stress a woman's physical, psychological and emotional well-being in support of her right to choose an abortion. *Id.* at 12-13. Finally, some view abortion as necessary to safeguard the right of a couple to produce only that number of children for whom they can properly provide. *See* Statement of Rabbi Brickner, *supra*, at 337.

Like the Jewish community, Christians have diverse and often sharply opposing views on abortion. Thus, for example, among the Baptist churches, there is no distinct moral or theological view on the subject of abortion. Denominational pronouncements reflect the views and guidance of elected representatives, but are not considered binding positions. Some authorities within the Baptist Church support liberty of conscience and the exercise of individual moral judgment, and advocate a public policy which guarantees the right of each woman to make her own decision with respect to abortion.

See McRae v. Califano, 491 F. Supp. at 697 (citing statement of Dr. James E. Wood, Executive Director of the Baptist Joint Committee on Public Affairs). However, the Southern Baptist Convention opposes "abortion on demand," and advocates legislative restrictions on abortion. *Id.* at 699 (citing 1976 and 1977 Resolutions of the Southern Baptist Convention).

The Episcopal Church, USA has consistently supported a woman's right to choose abortion and maintain control over her body. At its 1988 General Convention, the Church declared support for the " 'termination of pregancy' particularly in those cases where 'the physical and mental health of the mother is threatened seriously, or where there is substantial reason to believe that one child would be badly deformed in mind or body, or where the pregnancy has resulted from rape or incest'. . . . Termination of pregnancy for these reasons is permissible." Letter from Ann Smith, Office of the Presiding Bishop and the Executive Council of the General Convention, the Episcopal Church Center (March 6, 1989).

The General Synod of the United Church of Christ supports the legality of abortion, in recognition that "life is less than perfect and the choices that people have to make are difficult." United Church of Christ, *Abortion: A Resolution Of The 12th General Synod Of The United Church Of Christ* (Public Policy Pamphlet 12GS-12) (1979). The United Church of Christ thus sanctions a woman's right to consider abortion as an expression of her personal conscience, stressing only that she "act faithfully" when making such a decision. *Id.* In 1971, the Church sanctioned the weighing of such considerations as the "welfare of the whole family, its economic condition, the age of the parents, their view of the optimum number of children consonant with their resources and the pressures of population" when deciding whether to bear a child. *Freedom Of Choice Concerning Abortion* (adopted by the General Synod of the United Church of Christ) (June, 1971).

Other religious denominations respect a woman's right to choose precisely because of the diversity of views held by their members. For example, in its policy statement, the Presbyterian Church noted that it "exists within a very pluralistic environment. [The Church's] own members hold a variety of views. It is exactly that plurality of beliefs that leads us to the conviction that the decision regarding

abortion must remain with the individual, to be made on the basis of conscience and personal religious principle free from governmental interference." *Covenant And Creation: Theological Reflections On Contraception And Abortion* at 51 (adopted by the 195th General Assembly of the Presbyterian Church) (1983).

Canonical and theological history establishes that no unanimous tradition on the question exists within the Catholic Church. *See* Maguire, *The Catholic Legacy And Abortion*, 114 Commonweal 657 (1981). Furthermore, as *Amicus* Catholics for a Free Choice poignantly demonstrate, committed Catholics do not all agree on the subject of abortion. *See also* Brief *Amicus Curiae* of Catholics For A Free Choice, *Webster v. Reproductive Health Services*. Many Catholics view the abortion decision as one which must be evaluated by the individual with reference to theology, church tradition and individual prayer. *Id.* at 27.

The current official doctrine of the Roman Catholic Church sharply conflicts with that of many Jewish groups and Protestant denominations. *The Declaration on Abortion of the Sacred Congregation for the Doctrine of the Faith of November 18, 1974*, the current text on the teachings of the Roman Catholic Church, states that life begins at fertilization, and that abortion is immoral, although it does not take a position on the commencement of moral or legal personhood.

By passing legislation which restricts the rights of women to choose whether to continue their pregnancies, Illinois, Minnesota and Ohio have intruded into an area where the First Amendment's protection of religious freedom requires that women be allowed to follow the dictates of their individual consciences. These states have made it impossible for women to decide, in keeping with their sincere religious beliefs about when life begins and when termination of a pregnancy is appropriate, whether to have an abortion or continue a pregnancy. Abortion must remain a legal option for women so that they are free to consult their own conscience and beliefs in making a choice.

The establishment clause and the free exercise clause of the First Amendment require government neutrality and reasonable accommodation in the face of competing religious claims. These constitu-

tional principles simply do not allow states to set conditions for the termination of a pregnancy which effectively burden a woman's freedom of choice in such a way as to require her to follow the religious doctrine of a particular sect or sects and conform her conduct accordingly, even though she holds no such religious beliefs. "In the relationship between man and religion, the State is firmly committed to a position of neutrality." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963).

II. THE STATUTES AT ISSUE VIOLATE THE ESTABLISHMENT CLAUSE

A. The Establishment Clause Requires Government Neutrality Concerning Religion

The First Amendment's establishment clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). Last term, this Court reaffirmed that "government may not promote or affiliate itself with any religious doctrine or organization." *Allegheny County v. Greater Pittsburgh ACLU*, 109 S. Ct. 3086, 3099 (1989).

The Court has established a three-prong test to determine whether a statute violates the establishment clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citation omitted).

The *Lemon* test was further refined in *Allegheny*, 109 S. Ct. at 3101, where the Court described the establishment clause protection as follows:

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring).

A law will not pass constitutional muster if the purported secular purpose is a "sham". *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring). Thus, the "mere existence of some secular purpose" is not enough. *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring). The stated purpose must be "sincere." *Wallace v. Jaffree*, 472 U.S. at 75 (O'Connor, J., concurring).

As *Amici* argue below, while the purported purpose behind legislation restricting a woman's choice whether to continue her pregancy to term may be secular (*e.g.*, family harmony, protection of a woman's health), closer inspection reveals that these statutes are in fact animated by the religious beliefs of the legislators as to when life begins and when abortions should be permissible under their theological scheme. Although the majority in *Webster* did not address this First Amendment component of the attack on the Missouri statute, Justice Stevens faced this issue directly, concluding that the Missouri statute was an unconstitutional endorsement of one religious theory of when life begins. *Webster*, 109 S. Ct. at 3082 (Stevens, J., concurring in part and dissenting in part).

As this Court continues to review statutes which restrict women's right to choose whether to carry a pregnancy to term, the concerns raised by Justice Stevens in *Webster* arise with renewed urgency. Indeed, if the Illinois, Minnesota and Ohio statutes are permitted to stand, especially when coupled with *Webster*, the cumulative effect would be a serious erosion of establishment clause principles. As Justice Blackmun emphasized, writing for the Court in *Allegheny*, "we have expressly required 'strict scrutiny' of practices suggesting 'a denominational preference'. . . in keeping with 'the unwavering vigilance that the Constitution requires' against any violation of the Establishment Clause." 109 S. Ct. at 3109 (citations omitted).

B. The Statutes At Issue Establish Religion

The Illinois, Ohio and Minnesota statutes violate the establishment clause in several ways. First, they fail to serve or further the purportedly secular purposes identified by the states. Rather, they promote the religious view that life begins at conception, and are a thinly-veiled attempt to block access to abortion. "That fact alone compels a conclusion that the statute[s] violate[ ] the Establishment

Clause." *Webster*, 109 S. Ct. at 3082-83 (Stevens, J., concurring in part and dissenting in part), citing *Wallace v. Jaffree*, 472 U.S. at 56.

Illinois has argued that its rigid regulation of outpatient abortion clinics has a medical purpose—the protection of women's health. *Ragsdale v. Turnock*, 625 F. Supp. 1212, 1230 (N.D. Ill. 1985), *modified*, 841 F.2d 1358 (7th Cir. 1988). The record is to the contrary: Illinois was unable to present any evidence that the particular regulations at issue here were enacted to further that purported purpose. *Ragsdale*, 625 F. Supp. at 1230. In fact, the legislative history demonstrates the legislators' concern with the status of the fetus—a religious concept—and not the health of the woman or the safety of the clinics. The Illinois General Assembly intended to obstruct women's access to abortions when it created the challenged statutory scheme in 1973. *See Ragsdale*, P. Jt. App. at A4-A5[3] ("We must make the best of a very sorry situation by at least regulating that procedure so that the Abortion Mills will not proliferate") (statement of Rep. Hyde). This underlying impermissible purpose has been very successfully served by the Illinois statute—many private clinics have had to close since the statute went into effect, and there are vast areas of the state where there are no facilities available to women seeking to terminate a pregnancy. *Ragsdale*, 625 F. Supp. at 1227.

After reviewing the legislative history, the Illinois district court found that the regulatory scheme did not advance the purported secular legislative purpose. *Id.* (defendants failed to produce "any evidence at all" that the "statutes and regulations are medically necessary"). Indeed, the Seventh Circuit found that the Illinois legislature made the regulations at issue applicable to all clinics rather than clinics that perform abortions alone in "an effort to save the statute from unconstitutionality." *Ragsdale*, 841 F.2d at 1369.

The lack of any plausible secular explanation for the intrusive regulatory scheme and the legislators' focus on the nature of the fetus and not on the well-being and health of the woman involved demonstrates that the Illinois statute was intended to endorse the

[3]The proceedings of the Illinois House of Representatives General Assembly are included in plaintiffs' joint appendix.

sectarian position that life begins at conception. The establishment clause does not allow government to mandate one religious view. *See Allegheny*, 109 S. Ct. at 3104-05.

Minnesota's and Ohio's parental notification statutes similarly impose one religious view about abortion on their citizens. Both Minnesota and Ohio have argued, like Illinois, that the statutes have a valid secular purpose—the protection of the well-being of minors by encouraging them to discuss the abortion decision with their parents. *Hodgson v. State of Minnesota*, 648 F. Supp. 756, 766 (D. Minn. 1986), *rev'd*, 853 F.2d 1452 (8th Cir. 1988). *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd sub nom. Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988). A careful analysis of the legislative history, however, leads to the inescapable conclusion that the states were actually motivated by a non-secular purpose—preventing minors from having abortions in order to further the legislators' beliefs about when life begins. *Hodgson; Akron*.

The Minnesota legislators made little attempt to disguise the fact that they were motivated by their belief that life begins at the moment of conception and abortions should be strongly discouraged if not outlawed. *Hodgson*. Influential supporters of the legislation said they hoped, by encouraging minors to continue their pregnancies, to "save lives." *Id.* The Minnesota trial court found that the Minnesota legislature was motivated by "a desire to deter and dissuade minors from choosing to terminate their pregnancies." *Id.* Significantly, although the Eighth Circuit reversed the legal conclusions of the district court with regard to the constitutionality of the parental notice provision, the appellate court did not contradict the factual finding that the legislators were motivated by improper religiously-based purposes.

Both the district court and the Sixth Circuit apparently accepted, at face value, Ohio's assertion that the statute's purpose was to facilitate parental involvement in child rearing. *See Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. at 1130-1131, *aff'd*, 854 F.2d at 863. However, as the above discussion of *Hodgson* and *Ragsdale* indicates, it is probable that at least some of the legislators were seeking to advance their religious view of when life begins, an impermissible government purpose. Both the district and appellate

courts *did* conclude that Ohio could not present any legitimate state interest behind its onerous bypass procedures, *Akron v. Rosen*, 633 F. Supp at 1137; *Akron v. Slaby*, 854 F.2d at 863, presumably because the only reason for such a cumbersome process was to make it more difficult for minors to terminate their pregnancies.

Because the Illinois, Minnesota and Ohio statutes do not advance the interests they purportedly were designed to serve, the only plausible reason for such legislation is to further the belief that life begins at conception. Of course, this non-secular belief, unsupported by medical knowledge, may not be established by state law. *See Webster*, 109 S. Ct. at 3082 (Stevens, J., concurring in part and dissenting in part). *See also Aguillard v. Edwards*, 107 S. Ct. 2573, 2582 (1987) ("The Legislative history documents that the [creation science] Act's primary purpose was to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine . . . ."); *Wallace v. Jaffree*, 472 U.S. at 57-61.

The challenged statutes also fail under the 'effect' prong of the *Lemon* test. The Illinois regulatory scheme, which imposes onerous regulations unrelated to health concerns, *Ragsdale*, 625 F. Supp. at 1230, has a perceived and actual effect of advancing the non-secular aims of certain religions. The regulations essentially endorse the religious belief that life begins at conception, to the detriment of those who do not share it. *See Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976) ("[t]he State must confine itself to secular objectives, and neither advance nor impede religious activity").

The Ohio and Minnesota statutes fail under the second prong of the *Lemon* test as well. While Minnesota had asserted that its parental notice statute sought to encourage intra-family communication, no witnesses involved in the statute's implementation testified that the statute had a beneficial effect on the minors whom it was presumably intended to assist. *Hodgson*, 648 F. Supp. at 775. What the requirements of parental notification or judicial permission have done is to tell teenage girls that the state endorses the religious view that abortions are wrong. The placement of burdensome barriers, *see, e.g., Akron v. Rosen*, 633 F. Supp. at 1137; *Hodgson*, 648 F. Supp. at 764, in the way of young women seeking abortions conveys

the unmistakable message that abortion must be discouraged. This "symbolic union of church and state" cannot be allowed to stand. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-127 (1982).

In each case, the statute's message that abortion is wrong promotes "one religion or religious theory against another or even against the militant opposite" in contravention of the First Amendment. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). A woman from either Minnesota, Ohio or Illinois whose sincere religious beliefs have led her to decide to terminate a pregnancy has been ostracized by her state government and given an unmistakable message—not only does the state believe abortions are morally reprehensible, but also that the State will prevent her from acting on her religious beliefs. As this Court held last term in *Allegheny*, such favoritism is unconstitutional. 109 S. Ct. at 3101.

The three state statutes also violate the entanglement prong of the *Lemon* test, and will lead to the kind of religious and political divisiveness condemned by this Court in *Engel v. Vitale*, 370 U.S. 421, 436 (1962). State enforcement of restrictions on abortions, whether relating to the availablity of clinics (Illinois) or the requirement of parental notice (Minnesota and Ohio), put state governments in the position of aiding those religions and religious groups which believe abortion is wrong, to the detriment of those who believe decisions about terminating a pregnancy should be left to individual choice. As the weeks since this Court issued its *Webster* opinion have demonstrated, the tension between these two approaches has become a major political issue at the state and local level. There will be no end to the political controversy, and to the involvement of various religious groups in that controversy, unless this Court properly places a barrier between government and the individual choice to decide whether to continue a pregnancy.

Permitting the state to communicate the religious message that abortion is morally reprehensible flouts the guarantees of the establishment clause. The First Amendment prohibits the fusion of government and religion which occurs whenever government endorses or supports the theological tenets of one religion or several, over others. *See Grand Rapids Sch. Dist. v. Ball*, 473 U.S. at 389 (when

the government "conveys a message of governmental endorsement or approval of religion, a core purpose of the establishment clause is violated"). *See also Everson*. As this Court has said:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of government and religious functions or a concert of dependency of one upon the other to the end that official support of the state or federal government would be behind the tenets of one or of all orthodoxies; this is what the Establishment Clause prohibits.

School Dist. of Abington v. Schempp, 374 U.S. 203 at 222. *See also Allegheny*, 109 S. Ct. at 3099-3105.

The Illinois, Minnesota and Ohio statutes have placed government "behind the tenets" of some religions, to the detriment of *Amici* and other religious groups. This imposition violates the very core of the establishment clause.

III. THE CHALLENGED STATUTES IMPOSE AN IMPERMISSIBLE BURDEN ON A WOMAN'S FREE EXERCISE OF RELIGION

The three statutes before this Court purport to address a variety of state interests, including the mother's health, potential human life, and intra-family communication. As discussed above, these purported purposes merely provide a legislative cover for the real objective of the statutes, which is to impose such burdens on women seeking to terminate pregnancies that they are deterred from doing so. However, it is well established that states may not vindicate even legitimate interests in a manner which unduly infringes upon individuals' free exercise rights. *See School Dist. of Abington v. Schempp*, 374 U.S. at 222. The free exercise clause was designed to prohibit governmental interference with the individual's right to act in accordance with the dictates of her own conscience in matters of religion. *Wallace v. Jaffree*, 472 U.S. at 52. *See also United States v. Ballard*, 322 U.S. 78, 87 (1944).

Nowhere is this principle of government neutrality more important than in the highly controversial and emotional issue of reproductive rights. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *See also Eisenstadt v. Baird*, 405 U.S. 438 (1972); S. Law, *supra* at 1023. Because, for many women, the abortion decision necessarily implicates a woman's religious beliefs, restrictions on a woman's decision may interfere with the exercise of religious conscience by imposing one view (opposing abortion) and by stifling individual choice.

A. For Many Women, the Decision Whether To Terminate a Pregnancy Is an Issue of Fundamental Religious Belief

In *Roe v. Wade*, the Court held that a woman's right to decide whether to terminate her pregnancy was "fundamental." 410 U.S. 113, 152. *See also Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977) ("[t]he decision whether or not to beget or bear a child is at the very heart of [the] cluster of constitutionally protected choices"). Since *Roe v. Wade* was decided, the Court "repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983). Moreover, as this Court has noted, "[t]he States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986).

The plurality opinion in *Webster* tries to beg the question by claiming that "there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a 'fundamental right' to abortion . . . a 'limited fundamental constitutional right'. . . or a liberty interest protected by the Due Process Clause . . . ." *Webster*, 109 S. Ct. at 3058. However, as the *Webster* dissent correctly points out, the Court's failure to renew its commitment to protecting the fundamental privacy and First Amendment interests at stake has already led to an increasingly hostile and divisive political debate. 109 S. Ct. at 3079 (Blackmun, J., concurring in part and dissenting in part).

Amici urge the Court, in the three cases before it today, to reaffirm a half century of decisions holding that the right to make an individual decision regarding childbearing free from government

coercion—and to the exercise of one's religious beliefs and conscience free from governmental endorsement or disapproval—is a fundamental right. *See Wallace v. Jaffree; Roe v. Wade; Eisenstadt v. Baird*; *Griswold v. Connecticut; Skinner v. Oklahoma*, 316 U.S. 535 (1942).

Amici believe that this fundamental right is grounded in both privacy rights and freedom of religious conscience. State statutes regulating abortion restrict a woman's ability to exercise freely her private religious beliefs. Requiring a woman to conform her actions to the government's view of when life begins is repugnant to the protections of the free exercise clause.

This Court must not allow Illinois, Ohio and Minnesota to prevent women from exercising their religious freedom.

B. Statutes Regulating Abortion Affect Fundamental Religious Interests and Are Subject to Strict Scrutiny

As this Court has repeatedly acknowledged, the government may not burden the free exercise of religion unless it can establish that "an inroad on religious liberty. . . is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981). *See also Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987). The Court has further emphasized that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (when evaluating free exercise claims, the Court must consider "whether some compelling state interest . . . justifies the substantial infringement of [a] First Amendment right").

This First Amendment standard of review is applicable whether unemployment benefits are at stake, *see Hobbie*, or schooling for children, *see Yoder*, or the right to decide whether to continue a pregnancy, as in *Roe v. Wade*. The plurality decision in *Webster* failed to address the First Amendment component to the rights implicated by the Missouri abortion statute. For this reason, the plurality's suggestion that restrictions on abortion may be evaluated

under a lesser standard of review is unpersuasive. Indeed, the Court itself recently reiterated that statutes which implicate First Amendment rights must be strictly scrutinized. *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (applying the strict scrutiny test to strike down a state court conviction for desecration of the American flag).

Justice O'Connor's effort in *Webster* to respond to the uncertainties of the plurality opinion nevertheless failed to address the First Amendment aspect of the abortion debate. *Webster*, 109 S. Ct. at 3058-64 (O'Connor, J., concurring). It is this constitutional dimension—which only Justice Stevens addressed in his partial concurrence and partial dissent — that requires this Court to apply the very highest standard of review to any statute, including those regulating abortion, which restrict the enjoyment of rights guaranteed by the First Amendment.

Under this standard, as properly applied, only a compelling state interest justifies state infringement on fundamental free exercise rights. *See, e.g., Hobbie*, 480 U.S. at 141-42; *Thomas*, 450 U.S. at 718; *Sherbert*, 374 U.S. at 406. In keeping with these cases and consistent with this Court's logic, the statutes at issue must be evaluated under a strict scrutiny standard. *See Thomas*, 450 U.S. at 718; *City of Akron*, 462 U.S. at 427.

As demonstrated below, the instant statutes profoundly burden women's rights to the free exercise of their religious choices about childbearing. Moreover, Illinois, Minnesota and Ohio have failed to demonstrate that the statutes further a compelling state interest.

C. The Challenged Statutes Significantly Burden the Free Exercise of Religion

Illinois, Minnesota and Ohio have burdened women's free exercise rights by making it impossible for them to carry out their religious beliefs regarding a uniquely personal and moral decision. Although a woman in any of these states is still able to decide, on the basis of her personal religious beliefs or convictions, that she wishes to terminate her pregnancy, she may be prevented from implementing her decision. This Court has repeatedly held that state regulations which prevent someone from exercising his or her reli-

gious beliefs, without a compelling state interest, are unconstitutional. *See, e.g., Hobbie; Yoder.*

The Illinois licensing scheme virtually regulates private facilities out of existence, thus making it extremely difficult, if not impossible, for a woman in that state to obtain an abortion. As the district court judge found, "the challenged statutes and regulations do place a very real and a very heavy burden on the right of a woman to decide to terminate her pregnancy. The effect of the statutory and regulatory scheme is to increase the cost of abortions and decrease their availability." *Ragsdale*, 625 F. Supp. at 1227. Thus, the clear effect of the Illinois statute is to block the ability of Illinois women to obtain abortions. *Id.* at 1227 ("as a result of the scheme . . . the only outpatient abortion facility in northwest Illinois, will close . . . ."). [4]

The Minnesota and Ohio statutes also place serious barriers in the way of a woman's access to abortion, requiring a young woman to endure a sometimes insurmountable obstacle course of regulations before she can obtain an abortion. [5] The Ohio statute requires the attending physician personally to notify the parent, which impinges upon the minor's right to privacy, leads to intra-family conflict, and requires violation of the physician/patient privilege. It is also directly in conflict with the holding in *City of Akron*, 462 U.S. at 448, that states may not require physicians personally to obtain informed consent from parents of a minor.

Further, although there is a judicial bypass procedure, its burdensome pleading requirements and standard of proof vitiate any protection the legislature intended to accord young women. This Court has held that a bypass proceeding must assure "anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained . . . ." *Bellotti v. Baird*, 443 U.S. 622, 644

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[4]Moreover, since *Webster* appears to allow states to forbid the use of public facilities for abortions, upholding the restrictions on private facilities in the Illinois statute would mean that a state could virtually legislate abortion facilities out of existence.

[5]Amici refer to appellees' briefs in *Ragsdale* and *Akron Center for Reproductive Health* and appellant's brief in *Hodgson* for a fuller explanation of the burdens imposed by the statutes.

(1979). The potential three week wait for a judicial decision in Ohio does not comply with any notion of expediency. By requiring a woman to disclose her name and address, the Ohio statute fails to guarantee a woman's anonymity.

The Minnesota statute provides that a minor seeking an abortion must notify both of her parents and may not thereafter have an abortion for forty-eight hours. This mandatory two parent notification, which does not take into account whether the minor is living with both of her parents (or one or neither), amounts to an "absolute, and possibly arbitrary, veto" deemed unconstitutional in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). As with the Ohio statute, Minnesota's legislation will only promote family strife and subject the minor to additional emotional distress during an already difficult time. *Hodgson*, 648 F. Supp. at 763-64. Minnesota, like Ohio, has a judicial bypass provision which, because of its cumbersome procedures and built-in delays, is also unduly burdensome. *Hodgson*, 648 F. Supp. at 776.

The fact that these two statutes are directed at minors, in whose protection states may have a heightened interest, does not eliminate the constitutional concerns. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Danforth*, 428 U.S. at 74. Indeed, this Court has recognized minors' First Amendment rights in a number of contexts. *See, e.g., Tinker v. Des Moines Indep. Comm. Sch. Dist.* 393 U.S. 503, 506 (1969); *Hazelwood Sch. Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988).

Like adult women, many teenage girls have sincere religious beliefs which are protected by the free exercise clause. They face the same difficult choices as mature women in deciding whether to continue a pregnancy and should not have to overcome greater obstacles in effectuating that decision. Any contrary conclusion ignores this Court's recent decision in *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989). There, the Court held that minors and adults are equally responsible for their criminal activity and that minors, like adults, can be put to death for murder. The majority held that minors are "mature enough to understand that murdering another human

being is profoundly wrong, and to conform [their] conduct to that most minimal of all civilized standards." *Id.* at 2977. *Amici* do not necessarily endorse the Court's view that the Constitution allows the government to put minors to death. However, if minors can be presumed mature enough to appreciate the consequences of their actions and to be sentenced to death, it surely follows that they are mature enough to make and carry out decisions about procreation.

D. The Challenged Statutes Do Not Serve Any Compelling State Interests Which Would Justify Incursions in Religious Liberty

Any purportedly permissible state interest claimed by Illinois, Ohio and Minnesota in support of their legislation dissipates upon careful analysis. The purported state interest underlying the Illinois law is the preservation and protection of a patient's health. However, the Seventh Circuit found that: (1) "many of the physical plant requirements . . . have 'no medical justification whatsoever' when applied to first and early second trimester abortions"; and (2) the certificate of need proceeding requirement does not serve any articulable interest. *Ragsdale*, 841 F.2d at 1373-74. The record before this Court in these cases and many others establishes, without contradiction, that the health effects of unwanted pregnancies and delays in securing abortions are devastating. *See* National Research Council, *Risking the Future: Adolescent Sexuality, Pregnancies, and Childbearing* (1987).

The state interest underlying the Minnesota and Ohio statutes is purported to be the fostering of intra-family communication and protection of the well-being of pregnant minors. However, neither of these statutes effectuates the state's interest in maternal health; nor does either further intra-family communication. Indeed, intra-family communication, if poor, is unlikely to be improved by legislatively-mandated communication. Far from protecting minors, the notice/bypass statutes force minors into situations that can only increase their fear and anxiety, causing them to postpone the abortion until a later, more dangerous time. The statutes may also coerce a young woman into continuing a pregnancy against her personal wishes, religious beliefs and best interests, an equally unacceptable alternative.

The district court in *Hodgson* found that the Minnesota statute "fails to serve the State's asserted interest in fostering intra-family communication and protecting pregnant minors." 648 F. Supp. at 775. Similarly, the Ohio district court found that the Ohio statute overstresses parental interests and thus "misperceives" the permissible interest a notification statute may serve—the protection of minors. *Akron v. Rosen*, 633 F. Supp. at 1137. The Ohio district court found no compelling state interest to justify the burdensome notice/bypass scheme there. *Id.* Moreover, the Sixth Circuit concluded that "the State of Ohio has presented no legitimate justification for imposing its pleading requirement which . . . is a 'procedural trap.'" *Akron v. Slaby* at 862-63. As the lower courts have already determined, these statutes are not even rationally related to the advancement of the purported state interests.

The challenged statutes have been animated by the religious view that abortion is morally wrong and that life begins at conception. They impose that view on women who, as a matter of religious conscience, believe differently. Because these statutes conflict with the rights guaranteed by the First Amendment, they must fall.

Amici concur with the views of an Episcopal priest, who recently said:

> Whether pro-choice or anti-abortion, you do not have the right in this diverse, pluralistic society to force beliefs and opinions on others. There can never be a just law requiring uniformity of behavior on the abortion issue.[6]

Indeed, the First Amendment stands as a bulwark against government-enforced uniformity in exercising and implementing religious convictions.

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[6] *A Priest on Abortion: Women as the Proper Moral Agent*, Los Angeles Times, August 6, 1989, Part V, at 1, col. 1.

CONCLUSION

For the foregoing reasons, the decisions of the Courts of Appeal for the Sixth and Seventh Circuits should be affirmed and the decision of the Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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MOTION

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Case No. 88-805

Supreme Court Of The United States

October Term 1989

STATE OF OHIO

Appellants,

vs.

AKRON CENTER FOR REPRODUCTIVE HEALTH, an Ohio Corporation, et al.,

Appellee.

On Appeal from
the United States Court of Appeals
For the Sixth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIÆ* BRIEF AND BRIEF OF JAMES JOSEPH LYNCH, JR., AS *AMICUS CURIÆ* IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

As framed by the parties (57 LW 3438):

(1) Is judicial bypass procedure, which is component of parental consent statute regulating minor's right to abortion, constitutionally required?

(2) Does Ohio parental notification statute, which contains judicial bypass procedure, provide constitutionally sufficient framework for ensuring due process rights of minor seeking abortion?

(3) Can Ohio constitutionally require physician to provide notification to parent or other individual authorized to receive notice, of unemancipated, immature minor's intent to obtain abortion, and, if not, should physician notification requirement be severed to preserve integrity of statute and allow enforcement without offending provision?

and by *Amicus Curiæ*:

(4) Should *Roe v. Wade*, 410 U.S. 113 (1973) be reconsidered and discarded in favor of finding that a fetus is a member of Posterity, and therefore a person in the Constitutional sense, and thus entitled to the protection of the Constitution?

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MOTION FOR LEAVE TO FILE *AMICUS CURIÆ* BRIEF*

James Joseph Lynch, Jr., respectfully moves this Court, pursuant to Rule 36, for leave to file the accompanying brief of *amicus curiæ* in support of appellant.

Amicus is an attorney admitted to practice law in the highest court of the State of California, and a member of the Bar of this Court. He has taken an oath to uphold and defend the Constitution of the United States and to defend the poor, down trodden, and oppressed. He also presented a similar *Amicus Curiæ* Brief in *Webster v. Reproductive Health Services*, No. 88-605, decided in this court on July 3, 1989, in support of appellant, and has been granted permission to file a similar brief in behalf of three other states.** He is a former professor of Law, University of Northern California, Lorenzo Patiño School of Law. He is affiliated with, but does not represent, a number of pro-life groups and has himself concentrated his practice in the areas of Civil Rights Law, Human Rights Activities, Constitutional Law, and Criminal Defense. He has written and copy righted one article on Abortion entitled *Abortion and Inalienable Rights in American Jurisprudence: A Prospective Policy*. He lived four years in England where he engaged in a self directed study of the English Political System from the inception of the *Magna Carta* (1215). He is a graduate of McGeorge School of Law (1978).

This case touches and concerns the continuing validity of *Roe v. Wade*, and its progeny, and, as such, a decision herein will affect not only the Laws of the State of Ohio, but the State of California wherein *amicus* resides, and effects the rights of persons residing in California, and the liability of the state, and its taxpayers, may, or may not, be liable for damages depending upon the scope of rights belonging to a fetus, which in *amicus*' belief constitutes human life protected by the Constitution. It must be remembered that under Nazi Germany, nearly 9 million innocent lives were lost in a holocaust because no one, at the outset had the courage to say no.*** If, as contended here, a fetus is a human life, then *amicus* has an interest as a taxpayer to insure that his state's procedures are neither *contra bono mores*, nor illegal.

James Joseph Lynch, Jr., respectfully moves this Court, pursuant to Rule 36, for leave to file the accompanying brief of *amicus curiæ* in support of appellant on the grounds that all parties expressly refused consent when called.

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* A table of contents and table of authorities follows at pages (v) and (vii) respectively.

** Hodson v. Minnesota, No. 88-1125 and Minnesota v. Hodgson, No. 88-1309, and Ragsdale v. Turnock, No. 88-790. Indeed, since Webster consented, Ohio's deputy Attorney General is the sole deputy Attorney General to refuse consent. See Exhibits in support of this motion.

*** It is certain that the atrocities began at least as early as 1938. 6 Enclopædia Britanica 253a (1971). World War II did not start until September 1, 1939, by the Nazi, with United States entry on December 8, 1941 and then only because of events in Hawaii. 22 Id 681b, following.

Amicus is also concerned about the rights of that class of persons recognized in the Preamble of the Constitution denominated "posterity", and its subclass "fetus" and is concerned, and has been concerned for some time, that fetuses, have been unrepresented or under-represented in any court in the years of litigation which has followed since *Roe v. Wade* was decided in this court in 1973. *Amicus* was convinced then, and remains convinced that the court was misled as to the meaning of personhood in that arguably a fetus is a member of posterity found in the Preamble of the Constitution, and that it is imperative, for the preservation of a basic respect for human life, and the values enshrined in the Constitution of the United States that fetuses be recognized as a member of posterity, but due to the inherent nature of our adversary process, has been limited to writing articles concerning the topic.

It is *amicus*' desire, *pro bono publico*, to present to this court, from the fetus' point of view, the rights of the fetus, as it appears to be found in the term Posterity in the Preamble of the Constitution of the United States of America.

Dated: August 28, 1989

Respectfully submitted,

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Table of Contents

Questions Presented ..... (i)

Motion for Leave to File *Amicus Curiæ* Brief ..... (ii)

Table of Contents ..... (v)

Table of Authorities ..... (vii)

BRIEF OF *AMICUS CURIÆ* IN SUPPORT OF APPELLANT 1

INTEREST OF *AMICUS CURIÆ* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I *STARE DECISIS* IS LESS BINDING ON THIS COURT ON CONSTITUTIONAL ISSUES EVEN IN THE FACE OF LONG STANDING AND WIDESPREAD PRACTICE 6

II A FETUS IS A PERSON IN THE CONSTITUTIONAL SENSE BY VIRTUE OF THE TERM POSTERITY IN THE PREAMBLE OF THE CONSTITUTION 7

A. Introduction - Roe v. Wade Did Not Consider Posterity. 7

B. While the Preamble Does not Create Rights, it does define for Whom the Rights were Created 8

C. The Constitution was Established "By The

People" 9

D. The Preamble Creates Two Classes of Persons, on an Equal Footing - "Ourselves" and "Posterity" 10

E. Posterity Was Understood At the Time of Adoption to Include All Future Generations 12

F. That a Fetus was intended as a member of Posterity is Consistent with Common Law Tradition. 12

G. That a Fetus was intended as a member of Posterity is Consistent with the known object and Purposes of the Framers. 14

H. Posterity, including a fetus, has Presently Enforceable Rights 16

I. A fetus is life within the meaning of the 5th Amendment 18

III A STATE HAS AN INTERNATIONAL AND CONSTITUTIONAL OBLIGATION TO PROTECT HUMAN LIFE, AND THEREFORE THE REGULATIONS UNDER SCRUTINY ARE CONSTITUTIONAL 20

CONCLUSION 24

APPENDIX - Excerpts from Farrands, The Constitutional Debates A1

Table of Authorities

CASES

Adams v. Storey, 1 Paine (U.S.) 79, 1 Fed. Cas. 141 (1817) 9

Alamo School District v. Jones, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960) 13, 14, 15

Anderson v. United Realty Co., 79 Ohio St. 23, 86 N.E. 644 16

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 85 (1809) 9

Barber v. Pittsburgh, F.W. & C.R. Co., 166 U.S. 83, 17 S.Ct. 488, 41 L.Ed. 925 16

Bellotti v. Baird (Bellotti I), 428 U.S. 132 (1976) 22

Bellotti v. Baird (Bellotti II), 443 U.S. 622 (1979) 22

Bolling v. Sharpe, 347 U.S. 497 (1954) 6

Bowers v. Hardwick, 478 U.S. 186 (1986) 8, 21

Breckenridge v. Denny, 71 Ky (8 Bush.) 523 12

Brown v. Bd. of Education, 347 U.S. 483 (1954) (Brown III) 6

Brown v. Bd. of Education, 349 U.S. 289 ..... 6, 24

Brown v. United States, 256 U.S. 335 (1921) 21

Coggs v. Berherd, 2 Ed.Raym. 909 17

Ex Parte Garland, 4 Wall. 333 (1867) 6

Field v. Clark, 143 U.S. 649, 691 (1891) 6

Flash v. Cohen, 392 U.S.83 19

Furman v. Georgia, 408 U.S. 238 (1972) 21

Gannon v. Albright, 183 Mo. 238, 81 S.W. 1162 15

Gay v. Scates, 37 Pa 31 15

Gibbons v. Ogden, 22 U.S. (9 Weat) 1 (1824) 9, 11

Haward v. Howe, 12 Gray (Mass.) 49 15

Hertz v. Abrahams, 110 Ga. 707, 36 S.E. 409 15

Hockett v. State Liquor Licensing Board, 110 N.E.

485, 91 Ohio St. 176, L.R.S. 1971B, 7 8
Katz v. United States, 389 U.S. 347 (1967) 21
Knowlton v. Moore, 178 U.S. 87 (1900) 9
Larew v. Larew, 146 Va. 134, 135 S.E. 819 15
Locke v. New Orleans, 71 U.S. (4 Wall) 172 (1866) 9, 10
Logan v. Zimmerman, 455 U.S. 422 (1982) 23, 24
McIntosh v. Dill, 86 Okla. 1, 205 P. 917 ..... 18, 19, 20
Mullane v. Central Hanover B&T, 339 U.S. 706 (1950) 19, 20
People v. Emery, 314 Ill. 220, 145 N.E. 349 15
Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 5, 22
Plessy v. Ferguson, 163 U.S. 537 (1896) 6
Roe v. Wade, 410 U.S. 113 (1973) ..... i, 5, 7, 24
Scott v. Sanford, 60 U.S. (19 How.) 404 (1857) 9, 10, 11, 14
Sinkler v. Kneale, 401 Pa 267, 164 A.2d 93 (1960) 13, 18
United States v. Block, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877) 9, 11
United States v. Boyer, 85 F.425 (DC, Mo, 1898) 8
United States v. Classic, 313 U.S. 299 (1941) 9
United States v. Cruikshank, 92 U.S. (2 Otto) 542 (1876) 8, 9, 10, 11, 14, 21
United States v. Harris, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15,312 (1866) 9
United States v. Harris, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15,312 (1866) 11
Veazie Bank v. Fenno, 75 U.S. (8 Wall) 533 (1869) 9, 10
Webster v. Reproductive Health Services, 88-605 (July 3, 1989 ..... (ii), 8, 22
White v. Hart, 80 U.S. (13 Wall.) 646, 650 14

Witters v. Washington Dept of Social Svcs for the Blind, 474 U.S. 481 (1986) 13
Wright v. United States, 302 U.S. 583, 588 (1938) 9

CONSTITUTIONS

United States

Preamble 7, 19, A8
Article I, § 2, cl 3 ..... 9, 10
Art. I, § 8, cl. 17 15
Art. III, § 3, cl. 2 15
Art. IV, § 2, cl. 1 15
Art. IV, § 3, cl. 2 15
Art. VI, cl 2 21
1st Amendment 13
2nd Amendment 21
3rd Amendment 15
4th Amendment 15, 21
5th Amendment 7, 15, 19, 21
13th Amendment 9, 10
14th Amendment 7, 9, 10, 21
22nd Amendment, Section 2 17

CODES

Ohio

Revised Code §§ 2907.02, 2907.03, 2907.04, 2907.5,2907.6, or 2907.12 23
Revised Code, Juvenile Courts § 2151.14 (B) & (C) 22
Ohio Revised Code §§ 2151.85 and 2505.073 1
Revised Code § 2919.12 ..... 1, 2
Ohio Amended Substitute House Bill 319, ... 1

England

Magna Carta (1215), Article 54 13
13 Edw. I, c. 1 16
10 Halsbury's Statutes of England (4th Ed)

Constitutional Law, 25 Edw 1 (Magna Carta)(1297), p. 14, Notes, ¶ 2 21
17 Halbury's Laws of England (1st ed, 1911), Infants ¶¶ 132, 135 ..... 18 - 20
Statute of De Donis 16
Y.B. 12 Edw. IV, Mich., fo 14 b, pl. 16., fo. 19a, 25 16

MISCELLANEOUS

Acquinas, Summa Theologiæ, 1, q. 76, a. 5 and q. 118, a. 2 13
American Declaration of Independence, ¶ 2 14
American Jurisprudence (2nd) vol. 28, Estates, § 53 16
Aristotle, Politics, VII, 1335b, 24-26 13
Blackstone, Book IV, p. 198 13
Case & Steirs, Biology: Observation & Concept (1971), p. 110 19
Chitty on Contracts (23rd ed, 1968) 134 17
Colquhounn in Commentaries on the Thames, ix, 284 12
Corpus Juris Secundum, vol. 31, Estates § 4 15
American Declaration of Independence 14
Edge, "Voidability of Minor's Contracts; A Feudal Doctrine in a Modern Economy," 1 G.L.Rev. 205 (1967) 17
Encyclopaedia Britannica (1971) 14
Exodus, Chap. 21, verse 22 13
Farrand, Max, The Constitutional Debates, vol. 2, pp. 152, 163, 177, 193, 196, 209, 565, 582, 590, 651 17
Foster, Crown Law 273-277 (1762) 21
Gray, The Rule Against Perpetuities (4th Ed.) 13, 14, 15, 18
Hamilton, The Federalist Papers, No. 84. 10
Hobb, Leviathan (1651) 17

International Convention on the Prevention and Punishment of the Crime of Genocide, Congressional Digest, December 1984 21
Jacobs, Warren M. and Jacobs Mark A., MDs, Obstetrics and Gynecology, Family Health & Medical Guide (1979), page 93 20
Kings, Book I, verses 1-2 9
Landmark Briefs and Arguments of the Supreme Court of the United State, vol. 75 7
Laqueur, The Human Rights Reader 17
Locke, Second Treatise of Government (1690) 17
Magna Carta 9
McKechnie, *Magna Carta* 21
Noonan, Contraception, 86-88 (Harv. U. Press, 1965) 13
Oxford English Dictionary, Compact Edition, 1971 ..... 11, 12
Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852) 9, 11
Restatement (1st) Contracts § 77 17
Restatement (2nd) Torts §§ 63, 64, & 65 21
Rotunda, Treatise on Constitutional Law, Vol. 3, § 23.33, p. 512 (1986) 6
Id, pp. 663-64, note 1 ..... 12, 17
Id, pp. 688 ..... 12, 17
Samuel, Book I, verse 16 9
Samuel, Book II, Chap. 5, verse 9-20 9
Samuel Johnson, "Idler No. 3", p. 5 12
Stephens Commentaries, vol. 2, p. 342 (1841) ..... 18 - 20
Schwartz, The Bill of Rights, A documentary history 14
Verdross, *Forbidden Treaties int'l Law*, 31 AJIL 571 (1937) ..... Schwartz, The Bill of Rights, A

documentary history 17, 20
Id, *Jus Dispositivum & Jus Cogens in Int'l Law, 60* AJIL 55 (1966) 17, 21

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INTEREST OF *AMICUS CURIÆ*

The Interest of the *Amicus* is set forth *ante* in the Motion for leave to file this brief.

STATEMENT OF THE CASE

Plaintiffs filed an action challenging the Constitutionality of Ohio Amended Substitute House Bill 319, which enacted Ohio Revised Code §§ 2151.85 and 2505.073 and amended Ohio Rev.Code § 2919.12, which requires that a physician who intends to perform an abortion on an unmarried,

unemancipated minor must notify her parents unless one of several exceptions is present. Plaintiffs were the appellee herein, an unmarried minor believing she was pregnant, and several others who were refused an abortion at the Akron Center because of the imminent operation of H.B. 319. Defendants consisted of several City prosecutors, the Governor and Attorney General of the State of Ohio. The State of Ohio intervened, and appealed to the Sixth Circuit, and is the appellant herein. 854 F.2d 852, at 854 (1988).

Section 2919.12 provides that no person shall knowingly perform or induce an abortion upon an unemancipated minor unless one of the following is present:

> (1) the person performing the abortion has given at least twenty-four hours actual notice, in person or by telephone, to the parent or guardian of the minor;
>
> (2) one of the women's parents or her guardian has consented in writing;
>
> (3) a juvenile court has issued an order authorizing the minor to proceed with the abortion in the absence of parental notification; or
>
> (4) the juvenile court has constructively authorized the minor to consent to the abortion through its inaction. 854 F.2d, at 854.

In lieu of parental notification, the statute provides that notice may be given to a specified sibling, stepparent, or grandparent in a limited range of circumstances, and if they cannot be reached after reasonable effort, 48 hours constructive notice must be given by both regular and certified mail. The abortion may proceed after actual notice, or the expiration of the 48 hours after the constructive notice, unless the person notified clearly and unequivocally declines to consult with the minor, in which case, the abortion may

proceed forthwith. The notification procedure may be bypassed if the minor wishes to have an abortion without notification to her parents, guardian, or custodian by filing a complaint in the juvenile court of the county wherein the minor resides, a bordering county, or in the county where the facility to perform the abortion is found. The complaint must contain a statement that the complainant is pregnant, unmarried, unemancipated, under the age of eighteen, and that she does not wish to give notification to her parents. The complaint must further contain either or both of the following allegations:

> (a) that the complainant is sufficiently mature and well enough informed to intelligently decide whether to have an abortion without notification of her parents;
>
> (b) that one or both of her parents, her guardian, or custodian has engaged in a pattern of physical, sexual, or emotional abuse against her, or that the notification of her parents is otherwise not in her best interests. 854 F.2d, at 855.

The statute further provides that the court will rule only upon the allegations of the complaint. If the complaint alleges only that she is sufficiently mature and well enough informed to make the decision alone, and the court declines to accept this contention, it must dismiss the complaint without going on to determine whether notification is otherwise not in the minor's best interest. Only if both are alleged, may both be considered. The complainant must prove the allegations by clear and convincing evidence, and counsel must be provided to represent the complainant at the hearing in juvenile court. The statute has provided for an expedited procedure for this process which requires a hearing to be held by the 5th business day after the complaint has been filed, and a judgment must be entered immediately after the hearing. The failure of have a hearing within 5 days is deemed constructive authorization for the abortion without

notification to the minor's parents. If the court dismisses the complaint, the court must advise the minor of her right to an appeal, and the appeal must be docketed must be held within four days of filing the notice of appeal. Brief ior minor must be filed within 4 days after docketing, with oral argument, unless waived, within 5 days after docketing. Judgment must be entered immediately after the hearing. If a judgment in the court of appeals is not filed within 5 days of docketing, it is deemed to have given constructive consent to an abortion without notification. The court of appeals may shorten or extend the time limits on motion and a showing of good cause. All hearings are required to be conducted in a manner to preserve the anonymity of the minor, and all records kept confidential.

The legislation provides that violation the first time is a misdemeanor of the first degree, and that a second violation is a felony of the fourth degree. Any individual violating the statute is liable to the pregnant minor, and her parent, guardian, or custodian for civil compensatory and exemplary damages. Administrative procedures may also be instituted. It is a defense that minor provided false information as to her age, marital status, emancipation, or name and address of the person to be notified. This defense is available only if the person performing the abortion did not otherwise have reasonable cause to believe the information was false, or that compliance was not possible due to an immediate risk to the life or health of a pregnant minor.

The district court recognized that a state may permissibly require parental notification, but that Ohio's statute was constitutionally deficient for several reasons, viz the constructive order provisions, the provisions which require the physician, rather than someone else, the clear and convincing evidence test, all placed an unduly burdened the minor's right of access to an abortion. It also found that the pleading requirements violated precedents of this court, the judicial process too long, and the confidentiality provisions

were inadequate. 854 F.2d 856.

The appellant court affirmed, relying principally upon *Roe v. Wade*, 410 U.S. 113 (1973), subject to a state's right to protect minors an enunciated in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). 854 F.2d, at 857, 861, 862, 863, 864, 866.

SUMMARY OF ARGUMENT

1. This Court has recognized that unconstitutional conduct which has been widespread and in long use cannot stand, and that with respect to the Constitution, *stare decisis* is of less importance than in other cases, and therefore the holding of *Roe v. Wade* is not necessarily binding on this Court, and in fact should be rejected for reasons set forth hereinafter.

2. While the Preamble of the Constitution does not create any rights, it defines for whom the rights were created - Ourselves and Our Posterity, and a construction that Posterity includes fetuses is consistent with the intent of the framers and the common law understanding that a fetus was a person in being, such that a fetus is a person in the Constitutional sense, and because this was not brought to this Court's attention in *Roe v. Wade*, *Roe v. Wade* must be overruled as unsound and contrary to the intent of the framers.

3. Because a fetus is human life and a person in the constitutional sense, and the state has a valid and legitimate right to protect human life, recognized as an international duty, and imposed as a duty in the Constitution of the United States, the abortion regulations under scrutiny are constitutional.

Conclusion. Based upon the foregoing, this court should overrule *Roe v. Wade*, 410 U.S. 113 (1973) prospectively, reverse the decision of the Sixth Circuit at 854 F.2d 852 as to the constitutionality of the Ohio Statutes, and remand for further proceedings not inconsistent with this Court's opinion.

ARGUMENT

I

STARE DECISIS IS LESS BINDING ON THIS COURT ON CONSTITUTIONAL ISSUES EVEN IN THE FACE OF LONG STANDING AND WIDESPREAD PRACTICE

Statutes or practices inconsistent with the Constitution, however numerous, can create neither a power which the Constitution does not bestow nor furnish a construction which the Constitution does not warrant. *Field v. Clark*, 143 U.S. 649, 691 (1891); 3 Rotunda, Treatise on Constitutional Law § 23.33, p. 512 (1986). This court, with characteristic good grace, invalidated its own Rules of Court, in part, based on a Congressional Statute requiring attorney's to take an oath with respect to their activities before the civil war, when it was pointed out that the provision was in fact unconstitutional. *Ex Parte Garland*, 4 Wall. 333 (1867). Faced with the Constitutionality of "separate but equal facilities, a practice in existence throughout the south for nearly 60 years, and sanctioned by this Court, this Court overruled, and rightfully so, *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (*Brown III*). *Accord*, *Bolling v. Sharpe*, 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues which need to be resolved once and for all, this court has not allowed the fact that some issues were not properly addressed in the courts below from ordering further argument on the omitted issues so that the continuing controversy could be settled. *Brown III*, 347 U.S., at 488-89, 496 (1953); *Brown v. Board of Ed.*, 349 U.S. 289, 294, 298 (Nature of remedy to be utilized).

Such is the case at bench. This court can judicially notice its own docket, which has been impacted by abortion cases. Similarly, it is common news that throughout the country,

abortion controversy has led to disorder in the streets.[1]

This court, with the characteristic good grace it exhibited in *Garland*, should now recognize, for reasons which will become apparent hereinafter, that in *Roe v. Wade*, 410 U.S. 113 (1973) it was misled, *overrule* it prospectively, and remand for further proceedings in light of the fact that the fetus is, by virtue of the term Posterity, found in the Preamble of the Constitution, a person in the Constitutional sense.

II

A FETUS IS A PERSON IN THE CONSTITUTIONAL SENSE BY VIRTUE OF THE TERM POSTERITY IN THE PREAMBLE OF THE CONSTITUTION

A. Introduction - *Roe v. Wade* Did Not Consider Posterity.

This court in *Roe v. Wade*, 410 U.S. 113 (1973), *held* that a state had no right to regulate abortions in the first trimester of pregnancy in view of the right of privacy of the mother, could provide some regulation in the second trimester, and had the right to full regulation in the third trimester. In reaching this result, the court noted that Texas had failed to demonstrate where in the Constitution the fetus was a person in the Constitutional sense. 410 U.S., at 157-59. A reading of the Petition, Response, and Briefs on the merits by the parties and *amicus* in *Roe v. Wade*, shows that the primary focus of argument was on the term person as found in the 5th and 14th Amendments of the Constitution. 75 Landmark Briefs and Arguments of the Supreme Court of the United State. The opinion itself does not address the Preamble, nor any of the

[1] It is not suggested that the disorder is the reason for overruling Roe. Quite the contrary, the reason is because a fetus is a person in the Constitutional sense by virtue of the term Posterity found in the Preamble. The notation of the problem is put a recognition that the problem must be resolved.

terms found in the preamble.

In at least one subsequent opinion, this court has held that the right of privacy cannot be used by consenting adults in the privacy of their own bedroom to engaged in homosexual conduct forbidden by State Law. *Bowers v. Hardwick*, 478 U.S. 186 (1986). There is no case that has ever reported that a female, based on her right to privacy, can do whatever she wishes with her body, including acts of prostitution in the privacy of her own bedroom in violation of state law. *A fortiori*, if the fetus is a person in the Constitutional sense, it does not seem reasonably possible that a woman can, absent justification or excuse of taking the life of a fetus in violation of state law.

This court, just this term, *Webster v. Reproductive Health Services*, 88-605 (July 3, 1989), held that the statutes therein which withheld public funds, employees, and facilities from use in non-therapeutic abortions did not offend the Constitution. In doing so, it was noted that the decision all but wipes *Roe* off the books as an unconditional right to an abortion. Id, slip opinion concurring Opinion of Scalia, J., p. 1.

This court has used the term "posterity" on one prior occasion, *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 550 (1876), but has never before been called upon to define the term, and to, or for, whom it was intended to include.

B. While the Preamble Does not Create Rights, it does define for Whom the Rights were Created

The Preamble's true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. *United States v. Boyer*, 85 F.425 (D.C., Mo., 1898) (Quoting Mr. Justice Storey on the Constitution, Section 462). *Cf., Hockett v. State Liquor Licensing Board*, 110 N.E. 485, 91 Ohio St. 176,

L.R.S. 1971B, 7. That aside, it does define for whom the constitution was created, and where sovereignty resides. *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857);[2] *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

C. The Constitution was Established "By The People"[3]

The Constitution,[4] in the Preamble, declares that "We the

---

[2] The 13th & 14th Amendments do not overrule this proposition. Rather, they redefine citizen (See, Article 1, § 2, cl 3; § 9, cl. 1), and thus enlarge the class of persons who are citizens.

[3] Recorded history first notes that a sovereign rules with the consent of the governed in I Sam. 16, II Sam. 5, 9-20, I Kings 1-2. There, David as a youth was anointed as the successor to Jesse, his father. When his father died, he ruled over the seven tribes of Judah for seven years. At that time, when the rest of Israel were doing poorly, they noted that Judah prospered under David, so they asked that he rule them as well. Thereafter David ruled over all of Israel and Judah for forty years. But there is nothing to indicate the right to rule was in writing. Other codes, most notably the Code of Hammurabi, were in writing, but were unilateral acknowledgments of human rights. Thus, the *Magna Carta*, *infra*, appears to be the first written document executed by both the sovereign and its subjects. The U.S. Constitution abolished traditional concepts of sovereignty, placed sovereignty in the People, signed by their representative, and ratified by them according to their respective state procedures. *Infra*.

[4] In the solution of constitutional questions the same rule of interpretation, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power. *Adams v. Storey*, 1 Paine (U.S.) 79, 1 Fed. Cas. page 141, 145 (1817). The constitution and the law are to be expounded without leaning one way or the other, according to those general principles which usually govern the construction of fundamental or other laws. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 85 (1809). No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning. *Wright v. United States*, 302 U.S. 583, 588 (1938); *Knowlton v. Moore*, 178 U.S. 87 (1900). Words and terms are to be taken in the sense they were used and understood at common law and at the time the constitution and the amendment were adopted. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 542 (1869); *Locke v. New Orleans*, 71 U.S. (4 Wall.) 172 (1866); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188-189 (1824); *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15, 312 (1866); *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877); Pardoning Power of the President, 5

People" do ordain and establish this Constitution. "Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservation, 'We, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' Here is a better recognition of popular rights than volumes of those aphorisms which make the principle figure in several of our State bills of rights and which would sound much better in a treatise of ethics than a constitution of government." Hamilton, The Federalist Papers, No. 84.; Preamble, *Amicus* Appendix, p. A8.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold power and conduct the government through their representatives. They are what we familiarly call the "sovereign people" and every citizen is one of these people, and constituent member of this sovereignty. *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857);[5] *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

D. The Preamble Creates Two Classes of Persons, on an Equal Footing - "Ourselves" and "Posterity"

There being no debate, and the question of the meaning "to ourselves and our Posterity" being one of first blush, we must turn to the meaning commonly understood at the time of the adoption to determine its extent and application. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall) 533, 542 (1869); *Locke v. New*

Opinion U.S. Atty. Gen. 532, 535 (1852). Where there are several possible meanings of the words of the constitution, that meaning which will defeat rather than effectuate rather than effectuate the constitutional purpose cannot rightly be p *United States v. Classic*, 313 U.S. 299, 316 (1941).

[5] The 13th & 14th Amendments do not overrule this proposition. Rather, they redefine citizen (See, Article I, § 2, cl 3; § 9, cl. 1), and thus enlarge the class of persons who are citizens.

Orleans, 71 U.S. (4 Wall) 172 (1866); *Gibbons v. Ogden*, 22 U.S. (9 Weat.) 1, 188-189 (1824); *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15, 312 (1866); *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877); Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852).

The phrase in question begins with the preposition "to". As so used, it marks the object for which the purposes were secured. Webster's Dictionary of the English Language, 1968.

"Ourselves" is a pronoun, the plural of "ourself", and when used in the objective, as here, it simply serves as the reflexive pronoun corresponding to "we" or "us". *Ibid.* "We", in this case, appears at the beginning of the preamble and is defined by the parenthetical statement immediately following "the People of the United States." "Ourselves" is therefore synonymous with "the people of the United States" and hence also "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

"And" is a particle joining words and sentences, and expressing the relations of connection or addition. Webster's, op. cit. In this case, its purpose is to add to the object for which the purposes were secured. "Our" means of, or belonging to, "us", i.e., to the speaker (in this case "We, the People of the United States), or to the speaker and the person or persons whom he speaks for or includes. It is a possessive adjective corresponding to "We", "Us"; expressing the genitive of possession; also, the objective genitive, as in "our defense", "our Maker", "our persecutors". Oxford English Dictionary, Compact Edition, 1971. (Hereinafter, OED). Its purpose is to include "Posterity" on an equal footing with, and the same rights as, "our selves" as evidenced by the parallel structure of the phrase. Therefore, "posterity" is synonymous with "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

E. Posterity Was Understood At the Time of Adoption to Include All Future Generations

Posterity, as it appears in the Preamble, has not been defined by the Supreme Court, therefore we must turn to what the framer's understood it to mean at the time the constitution was adopted in 1789. *Ante*, footnote 3, and the citations therein.

"Posterity", at the time of the Framers, was defined as "1. The descendants collectively of any person; all who have proceeded from a common ancestor. 2.+.a. A later generation (with a plural). obs. b. All succeeding generations (collectively)." OED, op. cit. *Accord, Breckenridge v. Denny*, 71 Ky (8 Bush.) 523.

The Preamble is not concerned with an individual in particular, as in 1. Nor in the sense of 2.a, which in any event is obsolete. 2b appears to be the sense which the framers had in mind. Samuel Johnson, "Idler No. 3", p. 5, used it in that sense in 1758 when he wrote, "The Ocean and sun will last our time, and we may leave posterity to shift for themselves." It was again used in that sense by Colquhounn in Commentaries on the Thames, ix, 284 when he wrote in 1800 "They will deserve the Thanks of the Nation, and the gratitude of Posterity." OED, op. cit.

The Constitution was signed on September 17, 1787, and Congress on February 18, 1791 formally recognized that the states had ratified the Constitution and therefore it was in effect. 3 Rotunda, Treatises on Constitutional Law, pp. 663-64, note 1. Thus it may be assumed the same sense was intended. *Ante*, footnote 3, and the citations therein.

F. That a Fetus was intended as a member of Posterity is Consistent with Common Law Tradition.

The Framers used the term Posterity without qualification. In 1644, in a well known pamphlet, it was argued that Parliament can no more censure the issue of the mind than it can the issue of the womb." Milton, John, "Aeropagitica" (1644).[6] At common law, it was understood that certain members of future generations, fetuses,[7] were a life in being for the purposes of the Rule Against Perpetuities. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960). Moreover, prenatal injuries, were to a limited extent, recognized at Common Law. "To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and death by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them." Lord Coke, repeated by Blackstone at Book IV, p. 198.[8] And common law does not appear to have barred tort actions for prenatal injuries. *Sinkler v. Kneale*, 401 Pa 267, 164 A.2d 93, 94 (1960).

It thus appears that the framer's intended that "All succeeding generations (collectively)" include common law con-

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[6] Milton went on to observe that he did not believe that his remarks applied to Catholics. While this Catholic takes exception to the exception, his premise appears sound in all other respects. It may be that today he would have different feelings on the matter.

[7] That a fetal has rights was probably recognized as early as 322 BC at least. Aristotle, *Politics*, VII, 1335b, 24-26; Acquinas, *Summa Theologiæ*, 1, q. 76, a. 5 and q. 118, a. 2; Noonan, Contraception, 86-88 (Harv. U. Press, 1965). The Old Testament provided a remedy for anyone causing a miscarriage. 21 Exodus 22. It does not offend the Establishment Clause of the 1st Amendment merely because civil enforcement corresponds to the tenants of some religious beliefs. *Generally, Witters v. Washington Dept of Social Svcs for the Blind*, 474 U.S. 481 (1986).

[8] Lord Coke's rationale rested on the impossibility of determining when life began, hence there would always be reasonable doubt as to whether or not murder had been committed. Two reasons may be advanced for that. First, at common law, "No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband." *Magna Carta* (1215), Article 54. Thus, a failure of evidence. Second, medical knowledge as to the status of a fetus was quite primitive when compared to modern medical practices.

cepts of the rights of a fetus and to be synonymous with "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

G. That a Fetus was intended as a member of Posterity is Consistent with the known object and Purposes of the Framers.

As the Preamble appears to confer rights upon "posterity" equal to "our selves", it is necessary to determine whether the framer's[9] intended that the rights be vested. Ante, footnote 3, and the cites therein. One measure of intent would be to determine whether vesting has occurred for the purpose of the rule against perpetuities. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960).

Had the framers used "and our heirs", it would have created the equivalent of a fee simple absolute with the powers of alienation. But such a concept would have been inconsistent with the concept of "unalienable rights" found in the Declaration of Independence[10] and the concept of an "indestructible and perpetual union." *White v. Hart*, 80 U.S. (13 Wall.) 646, 650. Therefore, the framer's must have had a

[9] Of the 39 signers of the constitution, at least 8 were lawyers (of which one studied at the Middle Temple in London England and another studied law in England), two more appear to have studies law extensively (Chs. C. Pinchkney at the Middle Temple in London, England), and two more were, or became, judges. Generally, Encyclopaedia Britannica (1971) (Comparison with signers Volume 22, p. 695, with their biographies.). Hence it is fair to assume that the framer's were not unaware of what they were doing, and how to secure that which they wished to do.

[10] American Declaration of Independence; Schwartz, The Bill of Rights, A documentary history. The Declaration states, in relevant part: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain **unalienable** Rights, that among these rights, Government are instituted among Men, deriving their just powers from the consent of the governed, ..." American Declaration of Independence, ¶ 2.

different intent in mind when they used "Posterity."

If "Posterity" is to be viewed as conferring a contingent remainder to a class, then it must fail for being obnoxious to the rule against perpetuities because there would be members of the class capable of taking more than 21 years, plus the gestation period, after lives in being. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960). But if void, then it would create a fee simple absolute in the present generation, thus, once again, frustrating the intent of the framer's in creating "unalienable rights" and a "perpetual union". Therefore, another meaning consistent with the framer's intent must be found. *Ante*, footnote 3, and the citations therein.

Under the rule in Shelly's Case, a limitation of an estate to an ancestor for life, with the remainder to his heirs or the heirs of his body, gave the whole estate in fee to the ancestor. 31 *Corpus Juris Secundum*, Estates § 4. This rule applies only where the estate in freehold and the estate in remainder are created by the same instrument as in the Preamble. *People v. Emery*, 314 Ill. 220, 145 N.E. 349; 69 C.J.S. p. 512, note 77. Again, because this is inconsistent with the known intent of the framers, another meaning must be found. *Ante*, footnote 3, and the citations therein.

An estate tail may, under certain circumstances, be created or arise by implication. *Hertz v. Abrahams*, 110 Ga. 707, 36 S.E. 409; *Haward v. Howe*, 12 Gray (Mass.) 49; *Gannon v. Albright*, 183 Mo. 238, 81 S.W. 1162; *Gay v. Scates*, 37 Pa 31; *Larew v. Larew*, 146 Va. 134, 135 S.E. 819. Such a situation commonly arises if a conveyance[11] or devise in fee has been

[11] The Constitution expressly concerns estates and interests in lands. See, Art. I, § 8, cl. 17 (District of Columbia; Places purchased); Art. III, § 3, cl. 2 (forfeitures); Art. IV, § 2, cl. 1 (privileges and immunities), § 3, cl. 2 (property belonging to the United States; Amendment III (Quartering of soldiers); Amendment IV (Secure in their persons, houses); Amendment V (nor be deprived of ... property without due process of law; nor shall private

made to some particular person named without issue, upon an indefinite failure of issue. In other words, whenever it appears in the instrument creating the estate that it was intended that the issue of the first taker should take by inheritance in a direct line, and in a regular order and course of decent, so long as his posterity should endure, and an estate in fee or in tail is given in remainder upon an indefinite failure of issue, then the estate first created will be construed to be an estate tail, or fee tail. 28 American *Jurisprudence*, Second, Estates, § 53. *Cf., Barber v. Pittsburgh, F.W. & C.R. Co.*, 166 U.S. 83, 17 S.Ct. 488, 41 L.Ed. 925; *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N.E. 644, affmd 222 U.S. 164 (recognizing by *dictum* that this rule was followed at common law).

The Statute of De Donis[12] made fee tails unalienable by using the words "to A and the heirs of his body." In 1472, Taltarum's Case virtually abolished tails for most purposes. Y.B. 12 Edw. IV, Mich., fo 14 b, pl, fo 19a, 25. An estate in tail was not subject to The Rule Against Perpetuities because it was a present future interest. See, 13 Edw. I, c. 1; Y.B. 12 Edw. IV, Mich., fo 14 b, pl. 16., fo. 19a, 25. Hence it is reasonable to infer that in lieu of the common law formulation the framers chose "to ourselves and our Posterity" to effectuate their intent that the "first takers should take by inheritance in a direct line, and in a regular order and course of decent, so long as his posterity should endure". This construction would carry out and effectuate the intent of the framers that the rights conferred be "unalienable", and to create a perpetual union. *Ante*, footnote 3, and the citations therein.

II. Posterity, including a fetus, has Presently Enforceable Rights

There are three points in time when one could cross the threshold of being "our selves" (present interest) from

property be taken for public use without just compensation ....).

[12] 13 Edw. I, c. 1.

"posterity" (Presently enforceable future interests): conception; at birth; at age of capacity. Chitty on Contracts (23rd ed, 1968) 134; Restatement of Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed.Raym. 909.

Implicit in the Preamble is the concept that the Constitution is to be a social contract. Eg, Hobb, Leviathan (1651); Locke, Second Treatise of Government (1690); Laqueur, The Human Rights Reader. It was submitted to the People for ratification. 2 Farrand, Max, The Constitutional Debates, pp. 152, 163, 177, 193, 196, 209, 565, 582, 590, 651; Amicus Appendix. 3 Rotunda, op cit, p. 663, note 1. Thus it is implicit that acceptance could only be by those not suffering from a disability, ie., persons with the capacity to consent. R. Edge, "Voidability of Minor's Contracts: A Feudal Doctrine in a Modern Economy," 1 G.L.Rev. 205 (1967). Viewed as a social contract, the Individual in general promises the individual in particular to secure for him inalienable rights, in return for which the individual promises to conform to the laws of the majority which do not derogate[13] from the promise of inalienable rights. Such mutual promises have always been considered sufficient consideration for enforceability. Chitty on Contracts (23rd ed, 1968) 134; Restatement of Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed.Raym. 909.

As persons who have not reached the age of capacity[14] could not consent, Chitty, op. cit., it would appear that adults

[13] Verdross, *Forbidden Treaties int'l Law*, 31 AJIL 571 (1937); *Id, Jus Dispositivum & Jus Cogens in Int'l Law, 60 AJIL 55 (1966)*;.

[14] The 22nd Amendment provides: "Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age. Section 2. The Congress shall have the power to enforce this article by appropriate legislation." Arguably, without this provision, any "person born in the United States or under its jurisdiction" is a citizen, and could vote regardless of age. In practice, age was regulated by the States, and it was understood to be the common law age of maturity, unless modified by the respective states. 3 Rotunda, op. cit., p. 688, Historical Note.

are of the class "our selves," and all others of the class "Posterity."

At common law, with few exceptions, the tenant in possession of a fee tail could be enjoined from alienation by those with a right to inherit. Moreover, a *guardian ad litem*, a guardian appointed by a court, could prosecute or defend for an infant in any suit to which he may be a part, 2 Stephens Commentaries 342 (1841), or by the State acting in *Parens patriae*. *McIntosh v. Dill*, 86 Okla. 1, 205 P. 917, 925; 17 Halbury's Laws of England (1st ed. 1911), Infants ¶¶ 132, 135. Thus, it is clear that at common law that at least those members of Posterity who were born had a presently enforceable right.

Turning to whether a fetus, as a member of Posterity, had a common law protectable interest, it appears in the affirmative. As already noted, ante p. 10-11 citing Lord Coke, while it is was not murder to kill a child in a mother's womb, it was still a misprision (crime)!. The unborn was a life in being for purposes of the rule against perpetuities. Gray, op.cit. Moreover, it does not appear that common law barred tort actions for prenatal injuries, *Sinkler v. Kneale*, *supra*, 164 A.2d 93, 94 (1960), which could be brought by a representative. 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917; 17 Halbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135.

It thus appears that in view of the known object and intent of the framer's that they intended to create unalienable rights and a perpetual union, knew of the common law rights of the unborn, and chose Posterity without limitation to include within the class of persons protected the unborn conceived fetus.

I. A fetus is life within the meaning of the 5th Amendment

The Constitution provides, in relevant part:

"No person shall be, ... deprived of life ... without due process of law."

U.S. Constitution, 5th Amendment. Neither a State nor the federal government may utilize money to take life without due process of law. *Eg, Flash v. Cohen*, 392 U.S.83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Assuming, *arguendo*, that the fetus is a life, it has the right to representation, 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917; 17 Halbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135, to be heard on the question as to whether its life should be terminated. *Generally, Mullane v. Central Hanover B&T*, 339 U.S. 706 (1950).

It would appear that a fetus has all of the characteristics of life:[15] excretion,[16] ingestion,[17] respiration,[18] irritation,[19] and reproduction.[20] A zygote (early fetus) is viable, in contradistinction to the ovum and sperm which are not.[21] Whether or not it can be ascertained at any point in time that it is human is an absurd proposition; assuming it goes to term it cannot be anything but human. The fact that the zygote is not viable extrauterine does not negate the fact of life. Life exists in an environment. No one would seriously consider sending an astronaut tied to an "umbilical cord" on a space walk to test whether or not the astronaut were life by cutting the umbilical cord to see if the astronaut could survive; such a proposition is

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[15] Biology: Observation & Concept by Case & Steirs (1971), p. 110;.

[16] Id, pp. 122, 141, 143, 149-150.

[17] Id, pp. 70, 80.

[18] Id, pp. 8, 51, 64, 77.

[19] Id, irritation, pp. 267, 329, 330.

[20] Id, reproduction, pp. 122, 163-165, 298-299, 327, 329.

[21] Id, pp. 324-327.

absurd. Moreover, even a fetus securely within the womb will die if there is an abruption of the placenta.[22] Finally, the courts can judicially notice the advance of science in making possible test tube pregnancies, and transfers from one womb to another, all suggesting the presence of life from conception.

The terms "ensoulment", "psych", "free will", and when they manifest themselves, are not relevant. We are concerned with Posterity, and it cannot be denied, in light of the arguments heretofore made, that Posterity includes all future generation, with the conceived having a presently protectable interest. 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917; 17 Halbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135.

Therefore, the fetus is a life which may not be taken without due process of law, and a compelling, legitimate governmental interest.[23] *Generally, Mullane v. Central Hanover B&T*, 339 U.S. 706 (1950).

III

A STATE HAS AN INTERNATIONAL AND CONSTITUTIONAL OBLIGATION TO PROTECT HUMAN LIFE, AND THEREFORE THE REGULATIONS UNDER SCRUTINY ARE CONSTITUTIONAL

Under International Law, a State has the obligation to provide police protection of its citizens at home. Verdross,

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[22] Jacobs, Warren M. and Jacobs Mark A., MDs, Obstetrics and Gynecology, Family Health & Medical Guide (1979), page 93.

[23] Because a fetus is a person, the State has an interest in protecting that life, and it therefore becomes a balancing test weighing the interest of the mother against that of the fetus. It would appear then that the life of the fetus could be terminated only if it threatens the life of the mother, because other alternatives are now available such as transferring the zygote to the womb of a willing carrier or mother.

Forbidden Treaties int'l Law, 31 AJIL 571 (1937); *Id*, *Jus Dispositivum & Jus Cogens in Int'l Law*, 60 AJIL 55 (1966). The concept to protect a person from due process in American Jurisprudence is derived from the *Magna Carta* (1215). McKechnie,[24] *Magna Carta*; the Great Charter of King John. The 5th Amendment prohibits the taking of life without due process of law, and it is enforced and made binding against the states by the 14th Amendment. *Generally, Furman v. Georgia*, 408 U.S. 238 (1972), and it *progeny*; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

Given a state's obligation to protect it citizens at home, and to ensure life is not taken without due process of law, Ohio has a legitimate interest in providing for the protection of fetal life. It's citizens, and the citizen's of every state has an interest in insuring that there exists safeguards to insure that abortion does not become a tool for genocide. Eg, International Convention on the Prevention and Punishment of the Crime of Genocide, Congressional Digest, December 1984; U.S. Const., Art. VI, cl 2 (treaties).

This is not to say that a State may say a woman does not have any right to privacy and may never have an abortion. Clearly, the Constitution implicitly recognizes the right to privacy. U.S. Const., 2d (Quartering of soldiers), and 4th (search and seizure) Amendments; *Katz v. United States*, 389 U.S. 347 (1967), and its *progeny*. But it is equally clear that a person cannot use the right of privacy and the right to do with one's body what he or she wishes to do with their body if the conduct amounts, under state law, to a crime. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Nonetheless, every person has the right to self defense. Foster, Crown Law 273-277 (1762); Restatement (2nd) Torts §§ 63, 64, & 65; *Brown v. United States*, 256 U.S. 335 (1921). Thus it would appear

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[24] McKechnie is the recognized scholar on the *Magna Carta*. 10 Halsbury's Statutes of England (4th Ed) Constitutional Law, 25 Edw 1 (*Magna Carta*)(1297), p. 14, Notes, ¶ 2.

where the woman's life or health is endangered, termination of the pregnancy would be justified. But even here, there appears to be less drastic alternative means than outright abortion. This court can judicially notice, or remand for consideration, the fact that modern advances have made possible womb to womb transfers to embryos. On the same basis, this court may notice or remand the fact that there are many persons unable to conceive who would welcome such transfers.

There is another point to consider; the minor woman. As persons who have not reached the age of capacity[25] could not consent, Chitty, op. cit. If an adult does not have an absolute right to abortion, *a fortiori* neither does a minor female. *Danforth*, *supra*, *Bellotti v. Baird* (*Bellotti I*), 428 U.S. 132 (1976), and *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622 (1979), relied primarily upon *Roe*. But as *Roe* stands on quicksand for holding that a woman has an unqualified right to abortion, those opinion are similarly flawed. *Wesbster*.

But even more is at stake. We are dealing with minors, and nearly every state has laws which make it statutory rape to have carnal knowledge of a female under age, or incest or child abuse if done by a family member. How is the state to but an end to that evil crime, statutory rape, or incest, if there is no notification to anyone? It cannot, and thus the state has been hampered in its role of providing police protection of its citizens at home in the enforcement of its penal laws.

In the maintaining the anonymity of the child, both court found that the requirement that the minor disclose her true name somewhere in he pleading, and provide an address would not protect the minor. What the lower courts overlook is that the pleading is in juvenile court, and it appears that under Ohio Law, such pleadings are confidential and not open to the public. Ohio Revised Code, Juvenile Courts § 2151.14 (B)[26] & (C).[27] Having an address is reasonably necessary to schedule hearings, or resolve other matters in advance of the hearing. It is inconceivable that a constructive consent would hinder the minor's abortion, and such a finding is pure and simple an abuse of discretion to the absurd degree.[28] The judicial procedures, assuming no continuance, through to a judgment in the court of appeals is no more than 15 days. That is hardly unreasonable out of a nine month pregnancy. Finally, in view of the arguments *supra* on the voidability of minor's contracts, this court can note that court's have always provided a shield to protect minors from their own mistakes. Certainly, the taking of a life, be it fetus or otherwise, is bound to have a profound effect which few minors can appreciate, and may in fact not be prepared to face notwithstanding their own convictions. More importantly, a minor female who is pregnant, may have lurking in the background forces compelling a decision which

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[25] See footnote 14, supra.

[26] "Except as provided in division (C) of this section, the reports and records of the department shall be considered confidential information and shall not be made public. A probation officer may serve the process of the court within or without the county, and may make arrests without warrant upon reasonable information or upon view of the violation of sections 2151.01 to 2151.54; of the Revised Code, detain the person arrested pending the issuance of a warrant, and perform such other duties, incident to his office, as the judge directs. All sheriffs, deputy sheriffs, constables, marshals, chiefs of police, and other police officers shall render assistance to probation officers in the performance of their duties when requested to do so by any probation officer."

[27] "When a complaint has been filed alleging that a child is delinquent by reason of having committed an act that would constitute a violation of section 2907.02, 2907.03, 2907.04, 2907.5, 2907.6, or 2907.12 of the Revised Code; if committed by an adult and the arresting authority, a court or a probation officer discovers that the child or person whom the child caused to engage in sexual activity, as defined in section 2907.1 of the Revised Code, has a communicable disease, the arresting authority, court or probation officer immediately shall notify the victim of the delinquent act of the nature of the disease."

[28] Unlike *Logan v. Zimmerman*, 455 U.S. 422 (1982) where a person is deprived of a statutory benefit because the time frame was too short in which to make a decision, this provision **confers** a benefit in the event of default.

she might not otherwise have made, and for which laws were enacted for her protection. Such forces may be the very person subject to criminal prosecution who does not care to go to jail for the dirty deed he perpetrated, or to pay child support for the resulting pregnancy.

Based on the foregoing, Ohio's statutes which do nothing more than to insure that adequate notice is given to interested persons is a legitimate governmental function imposed by international law and the U.S. Constitution. It does not absolutely bar abortions, but does insure that life is not arbitrarily taken,[29] and it furthers the state interest in prosecuting statutory rape and incest.

CONCLUSION

Conclusion. Based upon the foregoing, this court should overrule *Roe v. Wade*, 410 U.S. 113 (1973) prospectively, reverse the decision of the Sixth Circuit at 854 F.2d 852 as to the constitutionality of the Ohio Statutes, and remand for further proceedings not inconsistent with this Court's opinion.

Dated: August 27, 1989

Respectfully submitted,

JAMES JOSEPH LYNCH, JR.
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Attorney for *Amicus Curiæ*

[29] Indeed, arguably Ohio, misled no doubt by *Roe*, has not gone far enough in the protection of fetal life because it allows the taking of the fetal life by default. *E.g., Logan v. Zimmerman*, 455 U.S. 422 (1982). But that issue is not now before the court, although under *Brown I* and *Brown II*, this Court could, land probably should, consider that issue as well.

EXCERPTS FROM

2 Farrand, Max, The Constitutional Debates*

[129]

COMMITTEE OF DETAIL, I

***

[Proceedings of the Convention, June 19 -- July 23.]

[152]

COMMITTEE OF DETAIL, IV

*****

VI

We the People of (*and*) the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New. York, New. Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity.

* Pages from Farrand's are indicated at the beginning of the page in [ ]. All punctuation and capitalization is exactly as found in Farrand's which faithfully follows the manuscript originals in Madison's book. All footnotes were omitted unless deemed important to the issues under consideration. The most commonly omitted footnote says "Found among the Wilson Papers and in Wilson's handwriting. Portions in parentheses represent parts crossed out. Italics represent later insertions."

1.

*****

[163]

COMMITTEE OF DETAIL, IX

*****

IX

We the People of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

1.

*****

[177]

Monday MADISON August 6

MADISON

Monday August 6th. In Convention

<Mr. John Francis Mercer from Maryland took his seat.>

Mr. Rutlidge <delivered in> the Report of the Committee of detail as follows: < a printed copy being at the

same time furnished to each member.>

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

****

[193]

TUESDAY, AUGUST 7, 1787.

JOURNAL

Tuesday August 7, 1787.

[To refer the report to a Committee of the whole Ayes -- 5; noes -- 4.

Delaware being represented during the Debate a question was again taken on ye Committee of ye whole Ayes --- 3; noes --- 6.]

On the question to agree to the Preamble to the constitution as reported from the committee to whom were referred the Proceedings of the Convention -- it was passed unan: in the affirmative [Ayes -- 10; noes --- 0.]

*****

MADISON

Teusday August 7th. In Convention

The Report of the Committee <of detail being> taken up,

***

The <preamble> of the Report was agreed to nem. con. So were Art: I & II.

*****

MCHENRY

Augt. 7.

*****

The preamble or caption and the 1. and 2. article passed without debate, ...

*****

COMMITTEE OF STYLE

Proceedings of Convention Referred to the Committee of Style and Arrangement.

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

ARTICLE I.

*****

COMMITTEE OF STYLE

Report of Committee of Style

WE, the People of the United States, in order to form

a more perfect union, to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****

[604]

THURSDAY, SEPTEMBER 13, 1787.

JOURNAL

Thursday September 13, 1787.

****

Resolved that the preceding Constitution be laid before the United States in Congress assembled,and that it is the opinion of this Convention that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of it's Legislature; for their asent and ratification. ***

*****

[604]

***

[To postpoine the report respecting the 22nd and 23rd --- 9; noes --- 1.] Ayes

*****

To strike out the word "to" before establish justice --- 8; bites --- 2,] Ayes

[641]

MONDAY, SEPTEMBER 17, 1787.

JOURNAL

Monday September 17, 1787.

Detail of Ayes and Noes

	The Constitution Unanimously agreed to.	To deliver over the Journal and papers to the President.	
	[567]	[568]	[569]
New Hampshire	aye	aye	aye
Massachusetts	aye	aye	aye
Rhode Island	aye	aye	aye
Connecticut	aye	aye	aye
New York	aye	aye	aye
New Jersey	aye	aye	aye
Pennsylvania	aye	aye	aye
Delaware	aye	aye	aye
Maryland	aye	aye	no
Virginia	aye	aye	aye
North Carolina	aye	aye	aye
South Carolina	aye	dd	aye
Georgia	aye	aye	aye

MADISON

Monday Sepr. 17. 1787. In Convention

The engrossed Constitution being read, ...

Docr. Franklin rose with a speech in hand ....

*****

[643]

... --- He then moved that the Constitution be signed ...

[644]

*****

On the question to agree to the Constitution enrolled in order to be signed. It was agreed to by all the States answering ay.

*****

[649]

MCHENRY

Monday Sepr. 1787.

Read the engrossed Constitution. Altered the representation in the house of representatives.

*****

[651]

THE CONSTITUTION
OF THE UNITED STATES

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****

AMICUS CURIAE

BRIEF

Nos. 88-805, 88-1125, 88-1309

Supreme Court, U.S.
FILED
AUG 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,
Appellant,
v.
AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

JANE HODGSON, M.D., *et al.*,
Petitioners,
v.
THE STATE OF MINNESOTA, *et al.*,
Respondents.

THE STATE OF MINNESOTA, *et al.*,
Cross-Petitioners,
v.
JANE HODGSON, M.D., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT IN NO. 88-805, AND RESPONDENTS-CROSS-PETITIONERS IN NOS. 88-1125 AND 88-1309

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS*	2
STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THERE IS A LONG LEGISLATIVE AND COMMON-LAW TRADITION RECOGNIZING AND REINFORCING PARENTAL AUTHORITY	5
A. Marriage	5
B. Travel	8
C. Contract	10
II. THIS COURT HAS LONG RECOGNIZED THAT PARENTAL AUTHORITY IS AFFIRMATIVELY PROTECTED BY THE CONSTITUTION	11
III. *DANFORTH* AND *BELLOTTI II*—AS WELL AS *ROE*—ARE ABERRATIONS IN THE LAW, AND SHOULD BE REPUDIATED	16
A. *Danforth* And *Bellotti II* Are Incompatible With The *Pierce* Line Of Cases	16
B. The Lower Courts' Decisions Highlight The Flaws In *Roe*	21
CONCLUSION	23

TABLE OF AUTHORITIES

CASES: Page

Akron v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983) 18
Akron Center for Reproductive Health v. *Slaby*, 854 F.2d 852 (6th Cir. 1988) 2
Bellotti v. *Baird*, 428 U.S. 132 (1976) 17
Bellotti v. *Baird*, 443 U.S. 622 (1979) ..... *passim*
Ginsberg v. *New York*, 390 U.S. 629 (1968) 14, 20
Haig v. *Agee*, 453 U.S. 280 (1981) 10
H.L. v. *Matheson*, 450 U.S. 398 (1981) 18
Hodgson v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*) 2, 22
Loving v. *Virginia*, 388 U.S. 1 (1967) 5
McNeil v. *Director Patuxent Institution*, 407 U.S. 245 (1972) 13
Meyer v. *Nebraska*, 262 U.S. 390 (1923) 12, 14
Michael H. v. *Gerald D.*, 109 S.Ct. 2333 (1989) 11, 15
O'Connor v. *Donaldson*, 442 U.S. 563 (1975) 13
Parham v. *J.R.*, 442 U.S. 584 (1979) 13, 19, 20
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) ..... *passim*
Planned Parenthood Ass'n of Kansas City v. *Ashcroft*, 462 U.S. 476 (1983) 18
Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976) ..... *passim*
Poe v. *Ullman*, 367 U.S. 497 (1961) 21
Prince v. *Massachusetts*, 321 U.S. 158 (1944) 15, 20
Roe v. *Wade*, 410 U.S. 113 (1973) 4, 21, 22
Rowan v. *Post Office Dep't.*, 397 U.S. 728 (1970) 14
Santosky v. *Kramer*, 455 U.S. 745 (1982) 15, 16
Shapiro v. *Thompson*, 394 U.S. 618 (1969) 8
Smith v. *Organization of Foster Families*, 431 U.S. 816 (1977) 4, 20
Stanley v. *Illinois*, 405 U.S. 645 (1972) 15
Thornburgh v. *American College of Obst. & Gyn.*, 476 U.S. 747 (1986) 21, 22
Turner v. *Safley*, 107 S.Ct. 2254 (1987) 5
Webster v. *Reproductive Health Services*, 109 S.Ct. 3040 (1989) 21, 22
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 12

TABLE OF AUTHORITIES—Continued

Page

Zbaraz v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S.Ct. 479 (1987) 18

U.S. CONSTITUTIONAL PROVISIONS:

Amendment I 12
Amendment XIII 11
Amendment XIV 11

STATUTES AND REGULATIONS:

10 U.S.C. § 505 (1982) 10
10 U.S.C. § 2104 (1982) 10
10 U.S.C. § 2107 (1982) 10
10 U.S.C. § 2107a (1982) 10
42 U.S.C. § 1981 (1982) 10
22 C.F.R. § 51.27 (1988) 10
Ala. Code § 30-1-5 (1983) 7
Ala. Code §§ 44-2-1 - 44-2-8 (1982 & Supp. 1989) 9
Alaska Stat. § 25.05.171 (1988) 8
Alaska Stat. §§ 47.15.010 - 47.15.080 (1988) 9
Ariz. Rev. Stat. Ann. §§ 8-361 - 8-367 (West 1989) 9
Ariz. Rev. Stat. Ann. § 25-102 (West 1976) 7
Ark. Stat. Ann. §§ 9-11-102 - 105 (1987) 7
Ark. Stat. Ann. §§ 9-29-101 - 9-29-108 (1987 & Supp. 1987) 9
Cal. Bus. & Prof. Code § 22-706 (Deering 1989) 10
Cal. Civ. Code § 4101 (West 1983) 7
Cal. Welf. & Inst. Code § 1300 (West 1984 & Supp. 1989) 9
Colo. Rev. Stat. §§ 14-2-106[1][a][I], 108 (1987) 7
Colo. Rev. Stat. §§ 24-60-701 - 708 (1988) 9
Conn. Gen. Stat. Ann. §§ 17-75 - 17-81 (West 1988 & Supp. 1989) 9
Conn. Gen. Stat. Ann. § 46b-30 (West 1986) 7
Del. Code Ann. Tit. 13, § 123 (1981) 7
Del. Code Ann. Tit. 18, § 2707 (1988) 10
Del. Code Ann. Tit. 31, §§ 5201, 5221 - 5228 (1985) 9

TABLE OF AUTHORITIES—Continued

	Page
D.C. Code Ann. § 30-111 (1988)	7
D.C. Code Ann. §§ 32-1101 - 32-1106 (1988)	9, 10
Fla. Stat. Ann. §§ 39.511 - 39.516 (West 1988)	9
Fla. Stat. Ann. § 741.04-0405 (West 1988)	7
Ga. Code Ann. § 19-3-2 (1982)	7
Ga. Code Ann. §§ 39-3-1 - 39-3-7 (1982)	9
Haw. Rev. Stat. § 572-1 (1985)	7
Haw. Rev. Stat. §§ 582-1 - 582-8 (1985 & Supp. 1988)	9
Idaho Code §§ 16-901 - 16-1910 (1979)	9
Idaho Code § 32-202 (1983)	7
Ill. Rev. Stat. ch. 23, ¶¶ 2591-2597 (Smith-Hurd 1988)	9
Ill. Rev. Stat. ch. 40, ¶ 203 (Smith-Hurd 1982)	7
Ind. Code Ann. §§ 31-6-10-1 - 31-6-23-4 (West 1979 & Supp. 1989)	9
Ind. Code Ann. §§ 31-7-1-6, 31-7-1-7, 31-7-2 (Burns 1980 & Supp. 1986)	7
Iowa Code § 232.171-72 (Supp. 1989)	9
Iowa Code § 595.2 (1980 & Supp. 1989)	7
Kan. Stat. Ann. § 23-106 (1988)	7
Kan. Stat. Ann. §§ 38-1001 - 1007 (1986)	9
Ky. Rev. Stat. § 402-210 (1988)	7, 8
La. Rev. Stat. Ann. § 9:211 (Supp. 1989)	7
La. Rev. Stat. Ann. §§ 46:1451 - 46:1458 (West 1982)	9
Me. Rev. Stat. Ann. Tit. 19, § 62 (1981 & Supp. 1988)	7
Me. Rev. Stat. Ann. Tit. 34-A, §§ 9001 - 9016 (1988)	9
Md. Fam. Law Code Ann. § 2-301 (1984 & Supp. 1988)	7
Md. Code Ann. Art. 83c, §§ 3-101 - 3-110 (1989)	9
Mass. Gen. Laws Ann. ch. 119 App., §§ 1-1 - 1-7 (West 1969)	9
Mass. Gen. Laws Ann. ch. 207, §§ 7, 24, 25 (West 1987 & Supp. 1989)	8
Mich. Comp. Laws Ann. §§ 3.701 - 3.706 (West 1981)	9

TABLE OF AUTHORITIES—Continued

	Page
Mich. Comp. Laws Ann. § 551.51 (West 1988)	7
Minn. Stat. Ann. §§ 260.51 - 260.57 (West 1982 & Supp. 1989)	9
Minn. Stat. § 517.02 (1969 & Supp. 1989)	7
Miss. Code Ann. § 93-1-5 (1972 & Supp. 1988)	7
Miss. Code Ann. §§ 43-25-1 - 43-25-17 (1981)	9
Mo. Ann. Stat. §§ 210.570 - 210.610 (Vernon 1983)	9
Mo. Ann. Stat. § 451.090 (Vernon 1986)	7
Mont. Code Ann. § 40-1-213 (1989)	7
Mont. Code Ann. §§ 41-6-101 - 41-6-106 (1987)	7
Neb. Rev. Stat. § 42-105 (1988)	7
Neb. Rev. Stat. §§ 43-1001 - 43-1009 (1988)	9
Nev. Rev. Stat. §§ 122.020 - 122.025 (1985)	8
Nev. Stat. §§ 214.010 - 214.060 (1986)	9
N.H. Rev. Stat. Ann. §§ 169-A:1-11 (1978 & Supp. 1988)	9
N.H. Rev. Stat. Ann. §§ 457:4, 457:5, 457:6 (1983 & Supp. 1988)	8
N.J. Stat. Ann. §§ 9:23-1 - 4 (West 1976)	9
N.J. Stat. Ann. §§ 37:1 - 6 (West 1968 & Supp. 1989)	8
N.M. Stat. Ann. §§ 40-1-5, 40-1-6 (1986)	8
N.M. Stat. Ann. §§ 32-3-1 - 32-3-8 (1986 & Supp. 1988)	9
N.Y. Dom. Rel. Law § 15 (McKinney 1988)	7
N.Y. Unconsul. Law §§ 1801 - 1806 (1979 & Supp. 1989)	9
N.C. Gen. Stat. § 51-2 (1987 & Supp. 1988)	7
N.D. Cent. Code § 14-03-02 (1981)	7
N.D. Cent. Code §§ 27-22-01 - 27-22-06 (1974)	9
Ohio Rev. Code Ann. §§ 2151.56 - 2151.61 (Baldwin 1989)	9
Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984)	7, 8
Okla. Stat. Ann. Tit. 10, §§ 531 - 537 (West 1987)	9
Okla. Stat. Ann. Tit. 43 § 3 (West 1979)	7
Or. Rev. Stat. § 106.060 (1983 & Supp. 1988)	7
Or. Rev. Stat. §§ 417.010 - 417.080 (1987)	9

TABLE OF AUTHORITIES—Continued

	Page
Pa. Stat. Ann. Tit. 48 § 1-5 (Purdon 1965 & Supp. 1989)	8
Pa. Stat. Ann. Tit. 62 § 731 (1968 & Supp. 1981)	9
R.I. Gen. Laws §§ 14-6-1 - 14-6-11 (1989)	9
R.I. Gen. Laws § 15-2-11 (1989)	8
S.C. Code Ann. § 20-1-250 - 270 (Law. Co-op. 1985)	7
S.C. Code Ann. § 27-17-10 (1976)	9
S.D. Codified Laws Ann. § 25-1-9, 12, 13 (1984 & Supp. 1989)	7
S.D. Codified Laws Ann. §§ 26-12-1 - 26-12-14 (1984 & Supp. 1989)	9
Tenn. Code Ann. §§ 37-4-101 - 37-4-106 (1984 & Supp. 1988)	9
Tenn. Code Ann. § 36-3-106, 107 (1984 & Supp. 1988)	8
Texas Fam. Code Ann. §§ 1.51-53 (Vernon 1975 & Supp. 1989)	8
Texas Fam. Code Ann. §§ 25.01-09 (Vernon 1986)	9
Utah Code Ann. § 30-1-2 (1989)	7
Utah Code Ann. §§ 55-12-1 - 55-12-6 (1986)	9
Vt. Stat. Ann. Tit. 18 § 5142 (1987)	8
Vt. Stat. Ann. Tit. 33 §§ 551 - 575 (1981)	9
Va. Code Ann. §§ 16.1-323 - 16.1-330 (1988)	9
Va. Code Ann. § 20-48, 49 (1989)	7
Wash. Code § 26.04.010 (1988)	7
Wash. Rev. Code Ann. §§ 13.24.010 - 13.24.900 (1962)	9
West Va. Code § 48-1-1 (1986)	8
Wis. Stat. Ann. § 765.02 (West 1981 & Supp. 1988)	7
Wyo. Stat. § 20-1-102 (1987)	7
Lord Hardwicke's Act, 1753, 26 Geo. 2, ch. 33	5, 6
LEGISLATIVE MATERIALS:	
Cong. Globe, 38th Cong., 1st Sess. (1864)	11

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS:	Page
W. Blackstone, *Commentaries*	5
J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests Of The Child* (1973)	19
Hobbes, *Leviathan* (Fuller, ed. 1952)	4
Locke, *Concerning Civil Government* (Brit. ed. 1952)	4
Restatement (2d) Contracts, §§ 6, 14 (1981)	10
J. TenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951)	11
2 Williston, *Contracts* §§ 222-248 (3d ed. 1959 & Supp. 1989)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-805

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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No. 88-1125

JANE HODGSON, M.D., *et al.*,

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v.

THE STATE OF MINNESOTA, *et al.*,

Respondents.

No. 88-1309

THE STATE OF MINNESOTA, *et al.*,

Cross-Petitioners,

v.

JANE HODGSON, M.D., *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT IN NO. 88-805, AND RESPONDENTS-CROSS-PETITIONERS IN NOS. 88-1125 AND 88-1309

INTEREST OF THE *AMICUS*

Amicus curiae Knights of Columbus is an international organization of 1.4 million members. It has a long history of pro-family advocacy. For example, *amicus* underwrote the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Moreover, a large percentage of its members are themselves parents. Because of its institutional interest, and the interests of its members, *amicus* believes that it can assist the Court by analyzing the impact of the present cases on the broader area of family rights generally. For these same reasons, *amicus* does not believe its interests will be fully attended to by existing parties. All parties have consented to the filing of this brief.

STATEMENT

In *Akron Center for Reproductive Health* v. *Slaby*, 854 F.2d 852 (6th Cir. 1988), and *Hodgson* v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*), the United States Courts of Appeals for the Sixth and Eighth Circuits have held that states may not require that the parents of adolescent girls be notified prior to their daughters' obtaining abortions, unless states provide a so-called "judicial bypass" procedure enabling a judge to determine that the girl is mature enough to decide to have an abortion without telling her parents, or that an abortion is in her best interests. As the Eighth Circuit explained, "[i]n view of the unique nature and consequences of the abortion decision, states do not have the constitutional authority 'to give a third party an absolute, and possibly arbitrary, veto,' over the minor's abortion decision." *Hodgson*, 853 F.2d at 1456, *quoting Bellotti* v. *Baird*, 443 U.S. 622, 643 (1979) (plurality opinion). *See also Akron Center for Reproductive Health*, 854 F.2d at 861 ("we hold that a parental notification statute must provide a bypass procedure that is consistent with the dictates of *Bellotti II*"). The Eighth Circuit upheld Minnesota's parental notification statute, provided that its judicial bypass procedure remains in force. The Sixth Circuit struck down Ohio's statute largely because that court thought the judicial bypass provision inadequate. *Amicus* argues that no "judicial bypass" provision is ever constitutionally required, and thus urges this Court to affirm the Eighth Circuit, except insofar as it found the bypass provision necessary, and to reverse the Sixth Circuit.

SUMMARY OF ARGUMENT

In a nearly unbroken tradition, stretching back to the received English common law, courts and legislatures have recognized that parental authority is not delegated by the state, but rather inheres in the nature of parenthood. Thus, many "fundamental" rights of children have been conditioned on their parents' consent. Children may not marry without their parents' consent. Their interstate travel is largely conditioned on their parents' consent. And their right to enter into contracts is also restricted, and often conditioned on their parents' consent. In a line of cases beginning with *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), this Court has repeatedly emphasized the same principle. Thus, it has insisted that "[t]he child is not the mere creature of the State," but on the contrary, his parents "have the right coupled with the high duty" to direct his education. *Id.* at 535.

Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976), and the cases following it, are incompatible with the *Pierce* line of cases, and with the long-standing tradition of legislative and common-law recognition of inherent parental authority. Most fundamentally, *Danforth* and its progeny err in asserting that the only authority that parents have over their children's abortions is whatever the state is permitted to delegate to them. Parental authority is most emphatically not the product of state delegation, but of nature itself. The lower courts' decisions in these cases further extending *Danforth*'s reasoning to parental notification stat-

utes, like *Danforth* itself, are symptomatic of *Roe* v. *Wade*'s noted tendency for sudden displacement of time-honored doctrines, and are thus symptomatic of *Roe*'s flawed nature. *Danforth* and its progeny, and *Roe* itself, should be reconsidered and overruled.

ARGUMENT

There is a nearly unbroken legal tradition, Constitutional, legislative and common-law, that the family has its "origins entirely apart from the power of the State." *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 845 (1977). Familial rights are therefore grounded "not in state law, but in *intrinsic* human rights, as they have been understood in 'this Nation's history and tradition.'" *Ibid.* (emphasis added; citations omitted). The family, in short, is logically prior to the State.[1]

That principle has often been codified in legislation recognizing and reinforcing parental authority. Thus, for example, childrens' rights to marry, to travel, and to make certain contracts are conditioned on their parents' consent. With the sole—and rather conspicuous—exceptions of *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), and its progeny, this tradition of family autonomy has been nowhere more forcefully expressed than in the precedents of this Court. *Amicus* respectfully urges the Court to resolve the dissonance created in the law by *Danforth* and *Bellotti* v. *Baird*, 443 U.S. 622 (1979), by restating in this case its long-standing theme of familial autonomy.

---

[1] Cf. Hobbes, *Leviathan*, ch. xxii (Fuller, ed. 1952) ("For the father and master being before the institution of the Commonwealth absolute sovereigns in their own families, they lose afterward no more of their authority than the law of the Commonwealth taketh from them"); Locke, *Concerning Civil Government*, ch. VI, par. 58 (Brit. ed. 1952) ("The power, then, that parents have over their children arises from that duty which is incumbent upon them, to take care of their offspring during the imperfect state of childhood").

I. THERE IS A LONG LEGISLATIVE AND COMMON-LAW TRADITION RECOGNIZING AND REINFORCING PARENTAL AUTHORITY.

Through both legislation and common law, both the federal government and the States have long acknowledged parents' authority by requiring their consent for important decisions made by their children.

A. Marriage

The most obvious example is marriage. It is a "fundamental right," *Loving* v. *Virginia*, 388 U.S. 1 (1967), and cannot be denied even to prisoners. *Turner* v. *Safley*, 107 S.Ct. 2254 (1987). Yet the requirement that a child obtain the consent of his or her parents before marrying has remained in force ever since its origins in the English common law.

Blackstone explains that the requirement was designed to reinforce a parent's natural duty:

> [t]he consent or concurrence of the parent to the marriage of his child under age, was . . . directed by our ancient law to be obtained: but now it is absolutely necessary; for without it the contract is void. And this also is *another means, which the law has put into the parents' hands, in order the better to discharge his duty*; first, of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages.

Blackstone's Commentaries, Book 1, Chap. XVI, par. 2 (Oxford 1966) (emphasis added; original emphasis omitted). In 1753, the rule was codified in "An Act for the better prevention of clandestine marriages," which required the consent of a parent or guardian in order for a person under twenty-one to marry.[2] Interestingly,

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[2] The statute provided, in relevant part, as follows: "And it is hereby further enacted, That all Marriages solemnized by License,

that statute allowed for the Chancellor or other officials to approve a "proper" marriage if a party's parent or guardian had been "induced unreasonably . . . to abuse the Truth reposed in him" and to withhold consent. It did *not*, however, provide for application to them in the first instance. And it certainly did not create a mechanism for them to supply their own consent in secret, without the parents' knowledge.

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after the said twenty-fifth Day of *March*, one thousand seven hundred and fifty-four, where either of the Parties, not being a Widower or Widow, shall be under the Age of twenty-one Years, which shall be had without the Consent of the Father of such of the Parties, . . . or if dead, of the Guardian or Guardians . . . and in case there shall be no such Guardian or Guardians, then of the Mother (if living and unmarried) or if there shall be no Mother living and unmarried, then of a Guardian or Guardians of the Person appointed by the Court of *Chancery*; shall be absolutely null and void to all Intents and Purposes whatsoever. XII. And whereas it may happen, that the Guardian or Guardians, Mother or Mothers, of the Parties to be married, or one of them, so under Age as aforesaid, may be *Non compos mentis*, or may be in Part beyond the Seas, or may be induced unreasonably, and by undue Motives to abuse the Truth reposed in him, her or them by refusing or withholding his, her or their Consent to a proper Marriage; Be it therefore enacted, That in case any such Guardian or Guardians, Mother or Mothers, or any of them, whose Consent is made necessary as aforesaid, shall be *Non compos mentis*, or in Parts beyond the Seas, or shall refuse or with-hold his, her or their Consent to the Marriage of any Person, it shall and may be lawful for any Person desirous of marrying, in any of the before-mentioned Cases, to apply by Petition to the Lord Chancellor, Lord Keeper, or the Lords Commissioners of the Great Seal of *Great Britain* for the Time being, who is and are hereby empowered to proceed upon such Petition, in a summary Way; and in case the Marriage proposed, shall upon Examination appear to be proper, the said Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the Time being, shall judicially declare the same to be so by an Order of Court, and such Order shall be deemed and taken to be as good and effectual to all Intents and Purposes, as if the Guardian or Guardians, or Mother of the Person so petitioning, had consented to such Marriage. Lord Hardwi.e's Act, 1753, 26 Geo. 2. ch. 33.

All 50 States and the District of Columbia still require parental consent for children to marry.[3] Only 5 states

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[3] Twenty-seven States and the District of Columbia simply require parental consent. *See* Ala. Code § 30-1-5 (1983); Ark Stat. Ann. § 9-11-102 - 105 (1987); Cal. Civ. Code § 4101 (West 1983); Del. Code Ann. Tit. 13, § 123 (1981); D.C. Code Ann. § 30-111 (1988); Fla. Stat. Ann. § 741.04 - 0405 (West 1988); Ga. Code Ann. § 19-3-2 (1982); Ill. Ann. Stat. ch. 40, ¶ 203 (Smith-Hurd 1982); Iowa Code § 595.2 (1980 & Supp. 1989); Ky. Rev. Stat. § 402.210 (1988); La. Rev. Stat. Ann. § 9:211 (Supp. 1989); Md. Fam. Law Code Ann. § 2-301 (1984 & Supp. 1988); Mich. Comp. Laws Ann. 551.51 (West 1988); Miss. Code Ann. § 93-1-5 (1972 & Supp. 1988); Mo. Ann. Stat. 451.090 (Vernon 1986); Neb. Rev. Stat. § 42-105 (1988); N.C. Gen. Stat. § 51-2 (1987 & Supp. 1988); N.D. Cent. Code § 14-03-02 (1981); Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984); Okla. Stat. Ann. Tit. 43 § 3 (West 1979); Or. Rev. Stat. § 106.060 (1983 & Supp. 1988); S.C. Code Ann. § 20-1-250 - 270 (Law. Co-op. 1985); S.D. Codified Laws Ann. § 25-1-9, 12, 13 (1984 & Supp. 1989); Utah Code Ann. § 30-1-2 (1989); Va. Code Ann. § 20-48, 49 (1989); Wash. Code § 26.04.010 (1988); Wis. Stat. Ann. § 765.02 (West 1981 & Supp. 1988); Wyo. Stat. 20-1-102 (1987). Eighteen states require a court's consent, in *addition* to parents' consent, in certain circumstances. For example, in New York an 18-year old may not marry without his or her parent's consent, but a 16-year old may not marry without *both* the consent of his or her parent's *and* that of a state superior court or family court judge. *See* N.Y. Dom. Rel. Law § 15 (McKinney 1988); *see also* Ariz. Rev. Stat. Ann. § 25-102 (West 1976) (same); Colo. Rev. Stat. §§ 14-2-106[1][a][I], 108 (1987) (same); Conn. Gen. Stat. Ann. § 46b-30 (West 1986) (same); Haw. Rev. Stat. § 572-1 (1985) (same); Idaho Code § 32-202 (1983) (minors under 18 require parental consent; girls under 16 also require consent of probate court); Ind. Code Ann. §§ 31-7-1-6, 31-7-1-7, 31-7-2 (Burns 1980 & Supp. 1986) (minors between 17 and 18 may marry without parental consent; girl under 15 who is pregnant or has given birth may marry with parental consent and judicial approval); Kan. Stat. Ann. § 23-106 (1988) (both parents' and court's consent required for minors under 18); Me. Rev. Stat. Ann. Tit. 19, § 62 (1981 & Supp. 1988) (minors under 18 require parental consent; minors under 16 also require consent of probate court); Minn. Stat. § 517.02 (1969 & Supp. 1989) (minors under 16 require both consent of parents' and consent of juvenile court); Mont. Code Ann. § 40-1-213 (1989) (minors under 18 require parental consent;

permit a court to consent in lieu of the parents, thus effectively emancipating the minor.[4] None, however, requires such a hearing to be conducted secretly from the parents.

B. Travel

A child's right to interstate travel, which is also a fundamental right, *Shapiro* v. *Thompson*, 394 U.S. 618

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minors under 16 require both parental and consent of district court judge); Nev. Rev. Stat. §§ 122.020 - 122.025 (1985) (same); N.J. Stat. Ann. §§ 37:1 - 6 (West 1968 & Supp. 1989) (same); N.M. Stat. Ann. §§ 40-1-5, 40-1-6 (1986) (same); Pa. Stat. Ann. Tit. 48 § 1-5 (Purdon 1965 & Supp. 1989) (same); R.I. Gen. Laws § 15-2-11 (1989) (minors under 18 require parents' consent, girls under 16 also require court's consent); Vt. Stat. Ann. Tit. 18 § 5142 (1987) (same); West Va. Code § 48-1-1 (1986) (same). Five states require parental *or* judicial consent. *See infra*, n.4.

[4] Alaska Stat. § 25.05.171 (1988) (minors between 16 and 18 require parental consent; minors between 14 and 18 may receive court approval if marriage is "in best interest" of minor, and parents either have consented or unreasonably refused consent); Mass. Gen. Laws Ann. ch. 207, §§ 7, 24, 25 (West 1987 & Supp. 1989) (minors under 18 require parental consent; court may waive requirement under specified c. cumstances); N.H. Rev. Stat. Ann. §§ 457:4, 457:5, 457:6 (1983 & Supp. 1988) (marriage by minors under 18 prohibited; court may waive disability for boys over 14, girls over 13 in its discretion); Tenn. Code Ann. § 36-3-106, 107 (1984 & Supp. 1988) (minors between 16 and 18 can marry with parental consent, but court may waive disability "upon good cause"); Texas Fam. Code Ann. §§ 1.51-53 (Vernon 1975 & Supp. 1989) (minors under 18 require either parental consent or court order; minors under 14 require court order). Other states, however, permit judicial consent in the limited circumstances where the girl is pregnant. *See, e.g.*, Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984) (minors under 18 require parental consent; court may consent when girl is pregnant); N.J. Stat. Ann. § 37:1 - 6 (West 1968 & Supp. 1989) (parental consent required for minors under 18; court consent also required for minors under 16; but both requirements waived where girl pregnant); Ky. Rev. Stat. § 402.210 (1988) (parental consent required for minors under 18; district court may waive consent requirement, in its discretion, in case of pregnant girl).

(1969), is likewise largely conditioned on his or her parents' consent. Forty-five states and the District of Columbia have enacted the Uniform Interstate Compact on Juveniles,[5] which provides rather elaborate procedures for a "parent . . . entitled to legal custody of a juvenile

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[5] *See* Ala. Code §§ 44-2-1 - 44-2-8 (1982 & Supp. 1989); Alaska Stat. §§ 47.15.010 - 47.15.080 (1988); Ariz. Rev. Stat. Ann. §§ 8-361 - 8-367 (West 1989); Ark. Stat. Ann. §§ 9-29-101 - 9-29-108 (1987 & Supp. 1987); Cal. Welf. & Inst. Code § 1300 (West 1984 & Supp. 1989); Colo. Rev. Stat. §§ 24-60-701 - 708 (1988); Conn. Gen. Stat. Ann. §§ 17-75 - 17-81 (West 1988 & Supp. 1989); Del. Code Ann. Tit. 31, §§ 5201, 5221 - 5228 (1985); D.C. Code Ann. §§ 32-1101 - 32-1106 (1988); Fla. Stat. Ann. §§ 39.511 - 39.516 (West 1988); Ga. Code Ann. §§ 39-3-1 - 39-3-7 (1982); Haw. Rev. Stat. §§ 582-1 - 582-8 (1985 & Supp. 1988); Idaho Code §§ 16-1901 - 16-1910 (1979); Ill. Rev. Stat. ch. 23 ¶¶ 2591 - 2597 (Smith-Hurd 1988); Ind. Code Ann. §§ 31-6-10-1 - 31-6-10-4 (West 1979 & Supp. 1989); Iowa Code § 232.171-72 (Supp. 1989); Kan. Stat. Ann. §§ 38-1001 - 1007 (1986); La. Rev. Stat. Ann. §§ 46:1451 - 46:1458 (West 1982); Me. Rev. Stat. Ann. Tit. 34-A, §§ 9001 - 9016 (1988); Md. Code Ann. Art. 83c, §§ 3-101 - 110 (1989); Mass. Gen. Laws Ann. ch. 119 App., §§ 1-1 - 1-7 (West 1969); Mich. Comp. Laws Ann. §§ 3.701 - 3.706 (West 1981); Minn. Stat. Ann §§ 260.51 - 260.57 (West 1982 & Supp. 1989); Miss. Code Ann. §§ 43-25-1 - 43-25-17 (1981); Mo. Ann. Stat. §§ 210.570 - 210.610 (Vernon 1983); Mont. Code Ann. §§ 41-6-101 - 41-6-106 (1987); Neb. Rev. Stat. §§ 43-1001 - 43-1009 (1988); Nev. Rev. Stat. §§ 214.010 - 214.060 (1986); N.H. Rev. Stat. Ann. § 169-A:1-11 (1978 & Supp. 1988); N.J. Stat. Ann. §§ 9:23-1 - 4 (West 1976); N.M. Stat. Ann. 32-3-1 - 32-3-8 (1986 & Supp. 1988); N.Y. Unconsul. Law §§ 1801 - 1806 (1979 & Supp. 1989); N.D. Cent. Code §§ 27-22-01 - 27-22-06 (1974); Ohio Rev. Code Ann. §§ 2151.56 - 2156.61 (Baldwin 1989); Okla. Stat. Ann. Tit. 10, §§ 531 - 537 (West 1987); Or. Rev. Stat. §§ 417.010 - 417.080 (1987); Pa. Stat. Ann. Tit. 62 § 731 (1968 & Supp. 1989); R.I. Gen. Laws § 14-6-1 - 14-6-11 (1981); S.C. Code Ann. § 24-17-10 (1976); S.D. Codified Laws Ann. §§ 26-12-1 - 26-12-14 (1984 & Supp. 1989); Tenn. Code Ann. §§ 37-4-101 - 37-4-106 (1984 & Supp. 1988); Texas Fam. Code Ann. §§ 25.01-09 (Vernon 1986); Utah Code Ann. §§ 55-12-1 - 55-12-6 (1986); Vt. Stat. Ann. Tit. 33 § 551 - 575 (1981); Va. Code Ann. §§ 16.1-323 - 16.1-330 (1988); Wash. Rev. Code Ann. §§ 13.24.010 - 13.24.900 (1962). The exceptions are Kentucky and North Carolina, which repealed their enactments of the Compact, and West Virginia, Wisconsin and Wyoming.

. . . who has run away without the consent of such parent" to petition a state court for a "requisition" securing the minor's return from the state to which he or she has fled. *See, e.g.*, D.C. Code § 32-1102, Art. IV(a) (1988). A child's freedom to leave the country is similarly conditioned.[6] Thus, passport officers may require children under 18 to obtain the consent of a parent or guardian before issuing them a United States passport. 22 C.F.R. § 51.27 (1988).

C. Contract

The right to enter into contracts—one of the basic rights guaranteed by 42 U.S.C. § 1981—is generally either effectively denied to children (the traditional rule), or else is conditioned on their parents' consent. *See, e.g.*, Cal. Ins. Code § 10-112 (Deering 1989) (requiring parental consent for minors to enter into certain insurance contracts); 18 Del. Code § 2707 (1988) (same). *See generally*, 2 Williston, *Contracts* §§ 222-248 (3d ed. 1959 & Supp. 1989) (discussing "infants'" lack of capacity to contract); Restatement (2d) Contracts, §§ 6, 14 (1981) (same). The federal government likewise requires parental consent before allowing minors to enlist in the military or join R.O.T.C. *See* 10 U.S.C. §§ 505(a), 2104 (b)(4), 2107(b)(4), 2107a(b)(4) (1982).

These restrictions, and others like them,[7] are not isolated oddities. Rather, they embody a fundamental tenet of the American legal tradition, namely that parents have

[6] The ability to travel out of the country, while not a "right," is nonetheless a constitutionally-protected "freedom." *Haig* v. *Agee*, 453 U.S. 280, 306-307 (1981).

[7] Many restrictions on children are quite mundane. *See, e.g.*, Cal. Bus. & Prof. Code § 22-706 (Deering 1989) (requiring parental consent for use by children under 18 of "tanning devices").

natural authority over their children, which the law recognizes and reinforces.[8]

II. THIS COURT HAS LONG RECOGNIZED THAT PARENTAL AUTHORITY IS AFFIRMATIVELY PROTECTED BY THE CONSTITUTION.

Apart from *Danforth* and its progeny, these same principles of family autonomy and parental authority have been repeated time and again in the precedents of this Court. Faced with a state statute that required all children to attend public schools, this Court insisted that

> [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instructions from public teachers only. *The child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to . . . prepare him for [his] additional obligations.*

Pierce v. *Society of Sisters*, 268 U.S. 510, 535 (1925) (emphasis added). *See also Michael H.* v. *Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality opinion) (" 'the Con-

[8] This same vision of family and state is apparent in the debates surrounding the Thirteenth and Fourteenth Amendments. The abolitionists argued the natural evils of slavery that the law had to remedy were not limited to involuntary servitude; slavery also caused the slave's "authority and responsibility to rear his children [to be] obliterated. The members of his family might be torn from him and scattered." J. TenBroek, *The Antislavery Origins of the Fourteenth Amendment* 122 (1951). Likewise, Senator Harlan, arguing in favor of the Thirteenth Amendment, noted that one of the evils of slavery was the "abolition practically of parental relation, [thus] robbing the off-spring of the care and attention of his parents." Cong. Globe, 38th Cong., 1st Sess. 1439 (1864). Senator Wilson agreed. He thought the Thirteenth Amendment necessary, in part, because "[t]hen the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law . . . ." *Id.* at 1324.

stitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition'") (citation omitted). Earlier, in *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923), the Court struck down a statute that purported to criminalize instructing children in foreign languages. The Court noted that "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education. . . ." *Id.* at 400. The statute, the Court held, interfered "with the power of parents to control the education of their own." *Id.* at 401.

The Court enforced the same principle, under the aegis of the Free Exercise Clause, in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). There, the Court held that a state could not require Amish children, against their parents' wishes, to attend high school. Reiterating its insistence that "[t]he child is not the mere creature of the State," *id.* at 233 (*quoting Pierce*, 268 U.S. at 535), the *Yoder* Court rejected the state's argument that it should be permitted to determine what type of education best served the Amish children. "[I]t seems clear that if the State is empowered as *parens patriae*, to 'save' a child from . . . his Amish parents . . . the State will in large measure influence, if not determine, the religious future of the child." 406 U.S. at 232. And that, the Court insisted, was well beyond the pale, since the "primary role of the parents in the upbringing of their children is now established beyond doubt. . . ." *Ibid.*

The *Yoder* Court reserved the question of how it would balance a state's right as *parens patriae* with the rights of parents and children in a hypothetical case where Amish children wished to obey a compulsory education statute against their parents' wishes. *Id.* at 231. Nevertheless, the Court warned "that such an intrusion by a State into family decisions . . . would give rise to grave questions of religious freedom comparable to those raised here and those presented in *Pierce*. . . ." *Id.* at 231-32

(citation omitted). Six years later, in *Parham* v. *J.R.*, 442 U.S. 584 (1979), the Court went far towards resolving even that question.

In *Parham*, this Court upheld a state statute that authorized state mental institutions to admit temporarily any minor merely upon the application of that minor's parents or guardians. If, after observation, the institution found evidence of mental illness, it was authorized to admit the minor "for such period and under such conditions as may be authorized by law." 442 U.S. at 591. Any child hospitalized for more than five days, however, could always be discharged simply upon the request of his or her parents. *Ibid.* Several institutionalized children filed a class action challenging the statute as a deprivation of liberty without Due Process. They argued that "the likelihood of parental abuse" in having them committed against their will required a formal adversarial hearing. 442 U.S. at 603.

In rejecting that argument, this Court stressed once again that "our constitutional system long ago rejected any notion that a child is 'the mere creature of the State'. . . ." 42 U.S. at 602, *quoting Pierce*, 268 U.S. at 535. On the contrary, the Court emphasized that its "jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Ibid.* Thus, an independent evaluation of the child by a staff physician at the hospital was all that due process required. *Id.* at 607.[9] The Court dismissed the argument that, because of the risk that some parents would abuse their children, a more formal procedure was necessary. "The statist notion that

[9] If the person to be committed were an adult instead of a minor, Due Process would require a full-scale adversary hearing. *See* 442 U.S. at 627 (Brennan, J., concurring and dissenting); *see also O'Connor* v. *Donaldson*, 442 U.S. 563, 580 (1975) (Burger, C.J., concurring); *McNeil* v. *Director Patuxent Institution*, 407 U.S. 245 (1972).

governmental power should supercede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Id.* at 603. The Court added it would not

> assume that the result in *Meyer* v. *Nebraska* . . . and *Pierce* v. *Society of Sisters* . . . would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school.

Id. at 603-04 (emphasis omitted). In short, because the child is not "the creature of the State" his parents' authority over him does not derive from the State.

Of course, as this Court has stressed, the State can and should *reinforce* parental authority. In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court upheld a statute that prohibited sales, to persons under 17, of pictures that "depict[ed] nudity" and were "harmful to minors." *Id.* at 632. The Court held that a state could properly accommodate parental authority by applying to minors a different definition of obscenity than that applicable to adults. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id.* at 639. Thus a "legislature could properly conclude that parents . . . are entitled to the support of laws designed to aid discharge of that responsibility." *Ibid.* Indeed, the Court has even upheld provisions giving parents complete discretion over what *non-obscene* sexual material may be delivered to their minor children. In *Rowan* v. *Post Office Dep't.*, 397 U.S. 728 (1970), it upheld a federal statute giving parents the right to have both their names and the names of their resident children under 19 deleted from mailing lists for material the parents judged to be "erotically arousing or sexually provocative." [10]

[10] Concurring, Justices Brennan and Douglas would have reserved the question of the constitutionality of applying the statute to all minors under nineteen. *See* 397 U.S. at 741 (Brennan, J., concurring).

The above cases all stand for the proposition that parental authority should not be invaded by the state, but instead ought affirmatively to be reinforced by it. None of those cases anywhere suggests that the state must create special mechanisms to "bypass" a child's parents without notice to the parents themselves.

Quite the contrary, where this Court *has* required judicial intervention is in cases where the state seeks to *terminate* parents' rights. Thus, the state may not remove a child from his or her parents, except upon notice and hearing. *Santosky* v. *Kramer*, 455 U.S. 745 (1982). And even then the state's case must meet the "clear and convincing" standard of proof. *Ibid.* Indeed, so profound is a parent's right to raise his or her children that a state may not terminate the parental rights of even certain unwed fathers except after notice and an adversary hearing. In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the Court mandated a hearing on the fitness of a resident, but unwed, father before the state could take custody of his children following their mother's death. "It is cardinal with us," the Court repeated, "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations *the state can neither supply nor hinder.*" 405 U.S. at 651, *quoting Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) (emphasis added). *See Michael H.* v. *Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality opinion) (*Stanley* line of cases rests "upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family") (footnote omitted).

III. *DANFORTH* AND *BELLOTTI II*—AS WELL AS *ROE*—ARE ABERRATIONS IN THE LAW, AND SHOULD BE REPUDIATED.

Danforth and its progeny are at odds with both the *Pierce* and the *Santosky* lines of cases. *Danforth* and *Bellotti II* forbid a state to accommodate parents' authority over their daughters' abortions, unless the state simultaneously provides for an *ex parte*—indeed affirmatively secret—proceeding to "bypass" the rights of the parents involved. This departure from an otherwise-settled tradition of protecting family autonomy is all the more remarkable because it was accomplished with so little fanfare.

A. *Danforth* And *Bellotti II* Are Incompatible With The *Pierce* Line Of Cases.

In *Danforth*, the Court struck down, among other things, a Missouri statute that required an adolescent to obtain her parents' consent before having an abortion. Writing for the majority, Justice Blackmun alluded only briefly to the *Pierce* line of cases and the fact that the lower court had upheld the parental consent requirement at issue as justified by the state's interest "in safeguarding the authority of the family relationship." 428 U.S. at 73. The *Danforth* majority then struck down that requirement by announcing simply that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." *Id.* at 74. Earlier in its opinion, the majority elaborated on why it thought that was so. Discussing a spousal consent requirement, which it also invalidated, the majority announced that "since the State cannot regulate or proscribe abortion during the first stage . . . the State cannot delegate authority to any particular person . . . to prevent abortion during that same period." *Id.* at 69. The majority also did not feel that allowing parents to "overrule" a decision "made by the

physician and his minor patient" would "serve to strengthen the family unit." *Id.* at 75. Nor did the majority think that it would "enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict . . . ." *Ibid.*

Bellotti v. *Baird*, 443 U.S. 622 (1979) ("*Bellotti II*"),[11] followed *Danforth* and struck down a Massachusetts statute which, as construed, required a minor seeking an abortion to first attempt to get her parents' consent. Failing that, she could still have an abortion if she persuaded a state court judge that the abortion was in her best interests.

The *Bellotti II* plurality struck down those provisions because they "g[a]ve a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." 443 U.S. at 643, *quoting Danforth*, 428 U.S. at 74. The plurality then announced that a parental consent requirement would only be constitutional if the minor had the opportunity (1) to substitute a judge's idea of her best interest for that of her parents, or else, (2) to convince the judge that she was mature enough to make the decision on her own even if the judge thought it against her best interest. 443 U.S. at 643-44. The plurality stressed that "every minor must have the opportunity . . . to go directly to a court *without first consulting or notifying her parents*." *Id.* at 647 (emphasis added). And if that court then determines "that she is mature and well enough informed to make intelligently the abortion decision on her own, the court *must authorize her to act without parental consultation* or consent." *Ibid.* (emphasis added).

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[11] In *Bellotti* v. *Baird*, 428 U.S. 132 (1976) ("*Bellotti I*"), the Court vacated an earlier opinion of the district court, and remanded it to that court for certification of several questions of construction to the Supreme Judicial Court of Massachusetts.

Unlike the *Danforth* majority, the *Bellotti II* plurality paid somewhat more attention to the traditional protection afforded to parental authority. Nevertheless, the plurality said *Pierce* and its progeny were distinguishable because "[t]he abortion decision differs in important ways from other decisions that may be made during minority." 443 U.S. at 642. The plurality reasoned that "[a] minor not permitted to marry before the age of majority is required simply to postpone her decision . . . a pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy." *Ibid.*[12]

At bottom, therefore, *Danforth* and *Bellotti II* justified their departure from the Court's longstanding protection of family autonomy with three arguments: (1) that bearing a child is a decision with implications more profound and more urgent than those of other decisions traditionally conditioned on parental consent; (2) that the state's interest in safeguarding parental authority would not be promoted when the parents and child are "fundamentally in conflict" over the child's desire to have an abortion; and (3) that the state may not *delegate* a right of consent to parents, because the state itself has no such right to give. None of these arguments compels *Danforth*'s conclusion.

1. To be sure, bearing a child has profound consequences for an unwed adolescent. It is, however, quite debatable whether those consequences are necessarily more profound than those of other decisions subject to parental control—whether or whom to marry, for ex-

[12] *Danforth*'s reach, of course, extends beyond *Bellotti II*. *See Planned Parenthood Ass'n of Kansas City* v. *Ashcroft*, 462 U.S. 476, 490-93 (1983); *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 439-42 (1983); *H. L.* v. *Matheson*, 450 U.S. 398 (1981). *See also Zbaraz* v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S.Ct. 479 (1987) (requiring judicial bypass for parental notification statute).

ample.[13] And the fact that a girl's unwed pregnancy may be a predicament more urgent than others hardly proves that a judge, who presumably has never met her before, is better capable of assisting her in facing it than her parents would be.

In short, neither the importance nor the urgency of a girl's pregnancy supports the notion that parents should be kept in ignorance of it. To the contrary, that a girl's decision to have an abortion will have so profound an impact on her, and that it may be influenced by the pressure of time and other practical considerations, only underscore the value of her parents' involvement.[14]

2. The Court suggested in *Danforth* that recognizing parents' right to "veto" their child's decision to have an abortion would not "enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the

[13] It is not only difficult, but probably fruitless, to guess whether a marriage or an unwed pregnancy, by itself, would have the greater impact on a child's future. For it is surely the entirety of *childhood*, an entirety not separable into discrete decisions amenable to one-at-a-time judicial proceedings, that has the greatest lifelong consequences.

> *To safeguard the right of parents* to raise their children as they see fit, free of government intrusion, except in cases of neglect and abandonment, *is to safeguard each child's need for continuity*. This preference for minimum state intervention and for leaving well enough alone is reinforced by our recognition that *law is incapable of effectively managing, except in a very gross sense, so delicate and complex a relationship* as that between parent and child.

J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests Of The Child* 13 (1973) (emphasis added). *Cf. Parham*, 442 U.S. at 504 ("Neither state officials nor federal courts are equipped to review such parental decisions").

[14] *Danforth* seems to presume that an adolescent will suffer adverse consequences only if she proceeds to bear her child. But abortion itself has adverse consequences, and the girl may live to profoundly regret that choice.

pregnancy has already fractured the family structure." 428 U.S. at 75. But there is no reason to assume that the family structure has been "fractured" whenever an adolescent wishes to conceal her pregnancy from her parents. That, no doubt, is the initial reaction of virtually every adolescent who becomes pregnant. Nor does the fact that the parents and their daughter are "in conflict" mean that the State's interest in reinforcing parental authority is somehow diminished. Parents and their children disagree all the time, and it is precisely when they do that parental authority is ordinarily exercised.

3. Most fundamentally, the *Danforth* majority misapprehended the source of parents' rights. It announced that the state cannot "give" to parents a right that it itself does not have—the right to "overrule a determination made by a physician and his minor patient." 428 U.S. at 75. Implicit in that statement is the notion that parents have only such authority as the State gives them to act in its stead. But " 'the child is not the mere creature of the state.' " *Parham*, *supra*, 442 U.S. at 602, *quoting Pierce*, 268 U.S. at 510. And since the family has its "origins entirely apart from the power of the State," parents' rights have their source "not in state law, but in intrinsic human rights. . . ." *Smith*, *supra*, 431 U.S. at 845. Thus, parents require no special legislative grace in order to "claim . . . authority in their own household to direct the rearing of their children . . . ." *Ginsburg*, *supra*, 390 U.S. at 639. Quite the contrary, "[i]t is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince*, *supra*, 321 U.S. at 166.

The statutes at issue in the present cases, like those limiting childrens' rights to marry, to travel, *etc.*, thus do not *delegate* anything. Rather, they recognize and re-

inforce the natural authority of parents over their children.

Parental authority is affirmatively undermined by the requirement, which both lower courts said they found in the Constitution, of a "judicial bypass" procedure for hiding childrens' abortions from their parents. That "requirement," as well as *Danforth* and *Bellotti II*, on which it rests, should be seen as the radical departure from constitutional, common-law and legislative tradition that it is. Cf. *Bellotti II*, 443 U.S. at 657 (White, J., dissenting) ("Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.").

As Justice Harlan once noted, protected liberties are defined

> in the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

Poe v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). *Danforth* and its progeny constitute just such a departure from a long tradition of protecting family autonomy.

B. The Lower Courts' Decisions Highlight The Flaws In *Roe*.

Amicus recognizes that a majority of the Court in *Webster* v. *Reproductive Health Services*, 109 S.Ct. 3040 (1989), did not believe a full-dress reconsideration of *Roe* v. *Wade*, 410 U.S. 113 (1973), was in order until the Court was presented with a starker conflict with its

holding. *Amicus* nonetheless respectfully suggests that the lower court decisions in this case are so symptomatic of much that is wrong with *Roe* that the Court should take this opportunity to reconsider it.

The decisions of the lower courts in these cases, and *Danforth* and *Bellotti II*, which underlie them, rest on the proposition that there is a constitutional right to abortion sufficiently "unique" to justify departing from the Court's traditional approach to parents' rights. *See, e.g.*, *Hodgson*, 853 F.2d at 1456.[15] That a right to abortion is claimed to be unique in this area of constitutional law—as it is said to be in so many others—demonstrates once again that it does not fit naturally anywhere in the Constitution. Established rules must always be changed to explain its presence. It is "painfully clear that no legal rule or doctrine is safe from *ad hoc* nullification . . . where an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh* v. *American College of Obst. & Gyn.*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). The result is that *Roe*'s "scheme for constitutionalizing the regulation of abortion has had [an] institutionally debilitating effect" on the law. *Ibid.* The present case provides the Court with an example of that debilitating effect in the context of over two centuries of family law. Overruling *Danforth* and *Bellotti II* would go far toward resolving that particular anomaly, but a definitive resolution of all such anomalies can result only from overruling *Roe* itself. *Amicus* thus respectfully urges this Court to reconsider and overrule *Roe*, or, if it goes no further, to restore its traditional jurisprudence of respect for parents' rights and family autonomy by at least disavowing, if not overruling, *Danforth* and *Bellotti II*.

---

[15] *Amicus* submits that there is and can be no constitutional right to abortion. See Brief of Knights of Columbus, as *Amicus Curiae*, in *Webster* v. *Reproductive Health Services*, No. 88-605.

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed, except insofar as it held a "judicial bypass" to be constitutionally required. The judgment of the Sixth Circuit should be reversed.

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BRIEF

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. *ROE v. WADE* CORRECTLY HELD REPRODUCTIVE CHOICE TO BE A FUNDAMENTAL CONSTITUTIONAL RIGHT, ROOTED IN TRADITIONAL CONCEPTIONS OF LIBERTY AND PRIVACY	3
A. Reproductive Choice Is Essential to a Woman's Control of Her Destiny and Family Life	4
B. Keeping Reproductive Choice in Private Hands Is Essential to a Free Society	10
II. EVEN IF CONSTITUTIONAL PRIVACY PRINCIPLES DID NOT SO PLAINLY PROTECT THE RIGHT TO ABORTION, EQUAL PROTECTION PRINCIPLES WOULD DO SO	13
A. Sex Classifications that Interfere with Bodily Integrity and Procreation Are Impermissible in the Absence of Compelling Justification	13
B. Restrictive Abortion Laws Classify on the Basis of Sex	15
C. The Political Process Is Inadequate to Protect Access to Abortion for All Women	18

PAGE

III. ONLY THE MOST COMPELLING INTERESTS MAY JUSTIFY STATE INTERFERENCE WITH THE ABORTION RIGHT, AND ONLY WHERE SUCH REGULATION IS NARROWLY TAILORED TO THOSE INTERESTS 20

A. Strict Scrutiny Properly Invalidates any Abortion Regulation Not Proven Necessary to Protect the Woman's Health or to Protect Potential Life 22

B. Any Significant Regulatory Interference with the Abortion Right Triggers Strict Scrutiny 25

CONCLUSION 29

TABLE OF AUTHORITIES

Cases: PAGE

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Bradwell v. Illinois, 16 Wall. 130 (1873) 16, 17

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PAGE

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PAGE

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BRIEF OF *AMICI CURIAE* 274 ORGANIZATIONS IN SUPPORT OF *ROE v. WADE* ON BEHALF OF APPELLEES

INTEREST OF *AMICI*

This brief is filed on behalf of 274 organizations, representing literally millions of individuals, which have joined together in an unprecedented alliance to urge this Court to reaffirm *Roe v. Wade*, 410 U.S. 113 (1973). *Amici* are Americans of both genders, all races, and most religions. They are Nobel Prize winners, government workers, teachers, religious activists, doctors, and lawyers. In short, they reflect the diversity of our society and the breadth of its support for constitutionally protected reproductive rights. From a multiplicity of perspectives, they have united in signing this brief as an expression of their belief that the promise of liberty and equality cannot be fulfilled without privacy and reproductive choice.

Amici have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court. A complete list of *amici* and their statements of interest are set forth at Appendix A.

SUMMARY OF ARGUMENT

For most of the twentieth century, this Court has held that government may not interfere with our family lives, or our most intimate decisions, unless it has the strongest possible reason. From *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), which held fundamental the right to educate one's children, to *Griswold v. Connecticut*, 381 U.S. 479 (1965), and succeeding cases, which held fundamental the right to use contraceptives, this Court has held the right of privacy to be a basic value implicit in the concept of ordered liberty. *Roe v. Wade*, 410 U.S. 113 (1973), correctly applied this principle to a woman's right to choose abortion. For few decisions are more appropriate to the private sphere of individual liberty than the uniquely personal, intimate, and self-defining decision whether or not to continue a pregnancy. This is so because of the central importance of this decision to the woman, and the value of keeping the state out of the business of

reproductive control. Thus *Roe* was correctly decided and should be reaffirmed.

If the basic principle of constitutional privacy affirmed in this Court's contraception and abortion cases should ever be doubted, an alternative basis for reaffirming *Roe* may readily be found in the Equal Protection Clause. Because restrictive abortion laws not only discriminate uniquely against women, but do so in a way that intrudes on women's most basic interests in health, bodily integrity, procreation, and family formation, they must be strictly scrutinized.

Because the right to choose abortion is fundamental on either of these theories, regulation of that right may be justified only by the state's demonstration of a compelling interest to which the regulation is narrowly drawn. In *Roe*, this Court set forth a careful framework for evaluating such interests that has been both sound and workable since. Under any fair application of that framework, this Court must strike down regulations, like those enacted by Ohio and Illinois here, that significantly burden a woman's right to choose abortion while serving closely no compelling interest.

ARGUMENT

I. *ROE v. WADE* CORRECTLY HELD REPRODUCTIVE CHOICE TO BE A FUNDAMENTAL CONSTITUTIONAL RIGHT, ROOTED IN TRADITIONAL CONCEPTIONS OF LIBERTY AND PRIVACY.

Roe v. Wade held the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. 113, 153 (1973). In so doing, *Roe* did not declare an absolute right to abortion, but simply announced that any government restricting access to abortion would be put to an exacting test: regulation of the abortion decision "may be justified only by a 'compelling state interest' " to which it is "narrowly drawn." *Id.* at 155.

This Court has never renounced this holding, and should not do so now.[1] *Roe* was correct because the decision whether to continue a pregnancy and become a parent is indeed fundamental, and no free society should allocate it exclusively to the state, as the following sections elaborate.[2]

A. Reproductive Choice Is Essential to a Woman's Control of Her Destiny and Family Life.

This Court has long acknowledged an unenumerated right to privacy as a species of "liberty" protected by the Due Process Clauses.[3] The principle is as venerable as *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), both of which protected parents' freedom to educate their children as they chose, free of the controlling hand of the state. In its modern elaboration, this right has continued to protect matters of child-rearing and family life from the overly

1 *Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040 (1989), while upholding several abortion regulations, in no way overruled *Roe*. As Chief Justice Rehnquist wrote for the plurality, "This case . . . affords us no occasion to revisit the holding of *Roe*, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause . . . and we leave it undisturbed." *Id.* at 3058; *see also id.* at 3061 (O'Connor, J., concurring in part and concurring in judgment).

2 Only three current members of this Court have ever disputed *Roe*'s premise that a woman's right to control pregnancy is fundamental. *See Roe*, 410 U.S. at 172-78 (Rehnquist, J., dissenting); *Doe v. Bolton*, 410 U.S. 179, 221-23 (1973) (White, J., dissenting); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 785-97 (1986) (White, J., dissenting); *Webster*, 109 S. Ct. at 3064 (Scalia, J., concurring in part and concurring in judgment).

3 Recognition of the right of privacy is only one among many instances in which this Court has recognized constitutional rights that are not expressly named in the text of the Constitution. To name but a few other examples, this Court has recognized unenumerated rights to freedom of association, *see NAACP v. Alabama*, 357 U.S. 449 (1958); to equal protection under the Fifth Amendment Due Process Clause, *see Bolling v. Sharpe*, 347 U.S. 497 (1954); to travel between the states, *see Shapiro v. Thompson*, 394 U.S. 618 (1969); to vote, *see Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); and to attend criminal trials, *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

intrusive reach of government. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (right to live with one's grandchildren); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to interracial marriage). The modern privacy cases have also established that the decision whether to have children is no less fundamental than any other decision about family life. This Court has consistently held since *Griswold v. Connecticut*, 381 U.S. 479 (1965), that "matters so fundamentally affecting a person as the decision whether to bear or beget a child" are accorded special protection under the Constitution, and has therefore strictly scrutinized laws restricting contraception. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). *Roe v. Wade* held that these principles extend no less to abortion.

The privacy line of cases rests centrally on " 'the moral fact that a person belongs to himself [or herself] and not others nor to society as a whole.' " *Thornburgh*, 476 U.S. at 777 n.5 (Stevens, J., concurring) (quoting former Solicitor General Fried, *Correspondence*, 6 Phil. & Pub. Aff. 288-89 (1977)). And the application of this principle to the abortion decision follows from the fact that "few decisions are more basic to individual dignity and autonomy" or more appropriate to the "private sphere of individual liberty" than the uniquely personal, intimate, and self-defining decision whether or not to continue a pregnancy. *Thornburgh*, 476 U.S. at 772 (majority opinion).

In two senses, abortion restrictions keep a woman from "belonging to herself." First and most obviously, they deprive her of bodily self-possession. As Chief Justice Rehnquist has observed in another context, pregnancy entails "profound physical, emotional, and psychological consequences." *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 471 (1981). To name a few, pregnancy increases a woman's uterine size 500-1000 times, resting pulse rate by ten to fifteen beats a minute, and body weight by twenty-five pounds or more.[4] Even the healthiest pregnancy may be marked by nausea, vomiting, more frequent urination, fatigue, back pain,

4 *See* J. Pritchard, P. McDonald & N. Gant, *Williams Obstetrics* 181-210, 260-63 (17th ed. 1985).

labored breathing, or water retention.[5] The medical risks involved in carrying pregnancy to term are numerous: of every ten women who go through pregnancy and childbirth, six are treated for some medical complication, and three are treated for major complications.[6] And of course labor and delivery impose extraordinary physical demands, whether over the course of six- to twelve-hour or longer vaginal delivery, or during highly invasive surgery in the one out of four deliveries that proceed by cesarean section.[7]

By compelling pregnancy to term and delivery even when unwanted, abortion restrictions thus exert far more profound intrusions into bodily integrity than the stomach-pumping invalidated in *Rochin v. California*, 342 U.S. 165 (1952), or the surgical removal of a bullet from a shoulder invalidated in *Winston v. Lee*, 470 U.S. 753 (1985). "The integrity of an individual's person is a cherished value of our society," *id.* at 760, because it is so essential to identity: "[to say] that my body can be used is [to say] that I can be used," C. Fried, *Right and Wrong* 121 n.* (1978).

These points would be too obvious to require restatement if the state were to compel abortions rather than to restrict them. Indeed, in colloquy with Justice O'Connor during the oral argument in *Webster v. Reproductive Health Service*, 109 S. Ct. 3040, former Solicitor General Fried, arguing for the United States, conceded that in such a case, liberty principles, although unenumerated, would compel the strictest review. Transcript of Oral Argument at 21-22, *Webster*. To be sure, as Mr. Fried suggested, restricting abortion does not literally involve "laying hands on a woman." *Id.* at 22. But this distinction should make no difference: the state would plainly infringe the bodily integrity of its citizens whether its agents inflicted knife wounds or

5 *Id.*

6 *See* R. Gold, A. Kenney & S. Singh, *Blessed Events and the Bottom Line: Financing Maternity Care in the United States* 10 (1987).

7 *See* D. Danforth, M. Hughey & A. Wagner, *The Complete Guide to Pregnancy* 228-31 (1983); S. Romney, M. Gray, A. Little, J. Merrill, E. Quilligan & R. Stander, *Gynecology and Obstetrics: The Health Care of Women* 636-37 (2d ed. 1981).

its laws forbade surgery or restricted blood transfusions in cases of private knifings.[8]

Apart from this impact on bodily integrity, abortion restrictions infringe a woman's autonomy in a second sense as well: they infringe the autonomy over decision-making in family affairs that this Court has long deemed central to the right of privacy. Liberty requires independence in making the most important decisions in life. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). "The decision whether or not to beget or bear a child" lies at "the very heart of this cluster of constitutionally protected choices," *Carey v. Population Services International*, 431 U.S. 678, 685 (1977), because few decisions can more importantly alter the course of one's life than the decision to bring a child into the world. Bearing a child dramatically affects " 'what a person is, what [s]he wants, the determination of [her] life plan, of [her] concept of the good' " and every other aspect of the " 'self-determination [that] give[s] substance to the concept of liberty.' " *Thornburgh*, 476 U.S. at 777 n.5 (Stevens, J., concurring) (quoting C. Fried, *Right and Wrong* at 146-47). Becoming a parent dramatically alters a woman's educational prospects,[9] employment opportunities,[10] and sense of self.[11] In light of these elemental points, it is no surprise that the freedom to choose one's own family formations is "deeply

8 Similarly, a state would surely be prohibited from compelling abortions even if it became technologically possible to do so without "laying hands on a woman."

9 Teenage mothers have high dropout rates: eight out of ten who become mothers at age seventeen or younger do not finish high school. *See* Fielding, *Adolescent Pregnancy Revisited*, 299 Mass. Dep't Pub. Health 893, 894 (1978).

10 Control over the rate of childbirth is a key factor in explaining recent gains in women's wages relative to men's. *See* Fuchs, *Women's Quest for Economic Equality*, 3 J. Econ. Persp. 25, 36-37 (1989).

11 This is so even if the woman who bears a child does not raise that child. Relinquishing a child for adoption may alleviate material hardship but is psychologically traumatic. Winkler & VanKeppel, *Relinquishing Mothers in Adoption: Their Long-Term Adjustment* (Institute of Family Studies Monograph No. 3, 1984).

rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. at 503 (plurality opinion).

These principles of decisional autonomy over childbearing are today virtually uncontroverted with respect to heightened constitutional protection for contraception.[12] But critics of *Roe* sometimes argue that abortion is "different in kind from the decision not to conceive in the first place." *Thornburgh*, 476 U.S. at 792 (White, J., dissenting). Justice White, for example, has asserted that, while the liberty interest is fundamental in the contraception context,[13] that interest falls to minimal after conception.[14]

This distinction is erroneous. For no bright line can be drawn between contraception and abortion in light of modern advances in science and medicine. Contraception and abortion are rather points on a continuum. "Conception" itself is a complex process of which fertilization of ovum by sperm is simply the first stage. According to standard contemporary medical authorities, conception begins not at the stage of fertilization, but rather six to seven days later when the fertilized egg becomes implanted in the uterine wall—which is itself a complex process.[15] Many contraceptives that are medically

12 The United States has conceded the correctness of the *Griswold* line of cases before this Court. *See* Brief for the United States as *Amicus Curiae* Supporting Appellants at 11-13, *Webster*; Transcript of Oral Argument at 20, *Webster* (argument of former Solicitor General Fried on behalf of the United States).

13 *See Griswold*, 381 U.S. at 502-03 (White, J., concurring in judgment); *Eisenstadt*, 405 U.S. at 463-64 (White, J., concurring in result).

14 *See Thornburgh*, 476 U.S. at 792-93 (White, J., dissenting) (arguing that presence of the fetus after conception changes not merely the state justification but "the characterization of the liberty interest itself").

15 *See Williams Obstetrics* at 88-91; Milby, *The New Biology and the Question of Personhood: Implications for Abortion*, 9 Am. J. Law & Med. 31, 35 (1983). Indeed, the American College of Obstetricians & Gynecologists, the preeminent authority on such matters, has adopted the following official definition of conception: conception consists of "the implantation of the blastocyst [fertilized ovum]" in the uterus, and thus is "*not* synonomous

accepted today operate after fertilization. For example, both oral contraceptives and the intrauterine device (IUD) are used not only to prevent fertilization but in some instances to prevent implantation.[16] Moreover, the most significant new developments in contraceptive technology, such as RU486, act by foiling implantation.[17] All such contraceptives blur the line between contraception and abortion.

In the absence of a bright physiological line, there can be no bright constitutional line drawn between the moments before and after conception. A woman's fundamental liberty interest does not simply evaporate when sperm meets ovum. "Indeed, if one decision is more 'fundamental' to the individual's freedom than the other, surely it is the postconception decision that is the more serious." *Thornburgh*, 476 U.S. at 776 (Stevens, J., concurring). To say this much is not to deny that profound evolutionary changes occur over the period from fertilization to birth. Of course there is a difference between "the freshly fertilized egg and . . . the 9-month-gestated . . . fetus on the eve of birth." *Id.* at 779. But as *Roe v. Wade* fully recognized, such differences go at most to the weight of the state's justification for interfering with a pregnancy; they in no way extinguish the woman's underlying fundamental liberty interest.

Thus *Roe* is not a mere "thread" that could be pulled without "unravel[ing]" the now elaborately woven "fabric" of this

with fertilization." *Obstetric-Gynecologic Terminology* 229, 327 (E. Hughes ed. 1972) (emphasis added). Such a definition is not surprising in view of the fact that only 50% of fertilized ova ever succeed in becoming implanted. *See Post-Coital Contraception*, The Lancet, Apr. 16, 1983, at 856.

16 *See* Hatcher, *et al.*, *Contraceptive Technology* 252-53, 377 (1988-89 ed.); U.S. Dep't of Health & Human Services, *IUDs: Guidelines for Informed Decision-Making and Use* (1987).

17 *See Contraceptive Technology* at 393; Nieman, *et al.*, *The Progesterone Antagonist RU486: A Potential New Contraceptive Agent*, 316 New Eng. J. Med. 187 (1987). RU486 has been used in France but not yet in the United States.

Court's privacy decisions.[18] Rather, *Roe* is integral to the principle that decisions about childbearing "come to this Court with a momentum for respect that is lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Thornburgh*, 476 U.S. at 775 (Stevens, J., concurring) (citing White, J., concurring in *Griswold*, 381 U.S. at 502-03 (quoting Frankfurter, J., concurring in *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949))). The decision whether to become a mother is too fundamental to be equated with the decision to buy a car, choose optometry over opthalmology, take early retirement—or any other merely economic decision that may be regulated by government on a showing of only a minimally rational basis.

B. Keeping Reproductive Choice in Private Hands Is Essential to a Free Society.

Even if there were any disagreement about what degree of bodily or decisional autonomy is essential to personhood, there is a separate, alternative rationale for the privacy cases: to keep the state out of the business of reproductive decision-making. Regimentation of reproduction is a hallmark of the totalitarian state, from Plato's *Republic* to Hitler's Germany, from Huxley's *Brave New World* to Atwood's *Handmaid's Tale*. "[T]otalitarian limitation of family size . . . is at complete variance with our constitutional concepts." *Griswold*, 381 U.S. at 497 (Goldberg, J., concurring). This is so whether the state compels reproduction or prevents it. For the state's monopoly of power cautions against *any* official reproductive orthodoxy.

This Court has long recognized that, for these reasons, the right of privacy protects not only the individual but also our society. As early as the decisions in *Meyer* and *Pierce*, the Court acknowledged that "[t]he fundamental theory of liberty" on which a free society rests "excludes any general power of the State to standardize" its citizens. *Pierce*, 268 U.S. at 535. As

18 Transcript of Oral Argument at 19, *Webster* (argument of former Solicitor General Fried on behalf of the United States). Counsel for Appellees gave the following complete reply: "It has always been my personal experience that when I pull a thread, my sleeve falls off." *Id.* at 26 (argument of Frank Susman).

Justice Powell likewise recognized for the plurality in *Moore*, " 'a free society' " is one that avoids the homogenization of family life. *See Moore*, 431 U.S. at 503 n.11. The right of privacy, like freedoms of speech and religion, protects conscience and spirit from the encroachment of overbearing government. As Justice Jackson stated in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 640-41 (1943), "[s]truggles to coerce uniformity of sentiment" are the inevitably futile province of "our totalitarian enemies." Preserving a private sphere for decision-making in matters of childbearing and rearing thus not only liberates the individual; it desirably constrains the state.[19]

Those who would relegate all control over abortion to the state legislatures ignore these fundamental systemic values. It is a red herring to focus on the question of judicial versus legislative control of reproductive decisions, as so many of *Roe*'s critics do; the real distinction is that between private and public control of that decision—the private control protected by the courts in *Griswold* and *Roe*, and the public control that the popular branches could well usurp in a world without those decisions.

Precisely because of the importance of a private sphere for family, spirit, and conscience, the Framers never intended that all issues on which moral disagreement exists be committed to the political arena. Quite the contrary,

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections . . . .

19 *See generally* Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989) (arguing that the constitutional right of privacy protects individuals from being turned into instrumentalities of the regimenting state, or being forced into an identity of the state's choosing).

West Virginia State Board of Education v. Barnette, 319 U.S. at 638. Such "withdrawal" of fundamental liberties from the political arena is basic to a system of *constitutional* democracy, as opposed to rank majoritarianism. And nowhere is such "withdrawal" more important than in controversies where moral convictions and passions run deepest—as the inclusion of the Free Exercise Clause attests.[20]

Nor did the Framers ever intend that toleration on matters of family, conscience, and spirit would vary from state to state. The value of the states and localities as "laborator[ies for] social and economic experiments," *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), has never extended to " 'experiments at the expense of the dignity and personality' of the individual." *Poe v. Ullman*, 367 U.S. 497, 555 (1961) (Harlan, J., dissenting) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring)). Rather, as Madison once warned, " '[I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution.' " *Everson v. Board of Education*, 330 U.S. 1, 65 (1947) (Appendix, Rutledge, J., dissenting) (quoting Madison, *Memorial and Remonstrance Against Religious Assessments*).

Roe v. Wade thus properly withdrew the abortion decision, like other decisions on matters of conscience, "from the vicissitudes of political controversy." It did not withdraw that decision from the vicissitudes of moral argument or social suasion

20 "The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views." *United States v. Ballard*, 322 U.S. 78, 87 (1944). Indeed, so clear is this principle that the Free Exercise Clause may afford a separate and alternative constitutional basis for the rights protected in *Roe*. *See generally* Brief *Amicus Curiae* for American Jewish Congress, *et al.*, *Webster*; *see also Webster*, 109 S. Ct. at 3085 & n.16 (Stevens, J., dissenting) (noting that "the intensely divisive character of much of the national debate over the abortion issue reflects the deeply held religious convictions of many participants in the debate").

by persuasive rather than coercive means.[21] In withdrawing the abortion decision from the hot lights of politics to the private sphere, *Roe* protected not only persons but the processes of constitutional democracy.

II. EVEN IF CONSTITUTIONAL PRIVACY PRINCIPLES DID NOT SO PLAINLY PROTECT THE RIGHT TO ABORTION, EQUAL PROTECTION PRINCIPLES WOULD DO SO.

Roe was correctly decided on a privacy rationale, and the Court need look no further before reaffirming that decision. But if *Roe*'s privacy foundation should ever be eroded, there exists a separate, alternative constitutional basis for reviewing restrictive abortion laws closely as *Roe* did: namely, the Equal Protection Clause. Because abortion restrictions both discriminate uniquely against women, and do so in a way that intrudes on women's basic interests in bodily integrity, procreation, and health, such laws should trigger strict scrutiny.

A. Sex Classifications that Interfere with Bodily Integrity and Procreation Are Impermissible in the Absence of Compelling Justification.

This Court has held that measures classifying on the basis of gender are unconstitutional unless the party suppporting the measure can "carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)).[22] A "searching analysis" is required because gender-based measures often

21 Nor, of course, did it bar even political efforts to reduce the abortion rate through noncoercive means—such as by funding sex education and contraception, and providing economic security to indigent mothers.

22 Indeed, because gender-based classifications discriminate on the basis of an immutable characteristic that has long been the predicate for social disadvantage, nothing should bar this Court from going further and declaring that "classifications based upon gender are inherently suspect" and thus trigger the strictest scrutiny—a question expressly left open in *Mississippi University for Women*, 458 U.S. at 724 n.9; *see Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion).

reflect the "mechanical application," *Mississippi University for Women*, 458 U.S. at 726, of " 'old notions' and 'archaic and overbroad' generalizations," *Califano v. Goldfarb*, 430 U.S. 199, 211 (1977) (plurality opinion) (quoting *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) and *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)), and operate to "put women not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. at 684 (plurality opinion). Thus, this Court has repeatedly struck down legislation that restricted the exercise by both men and women of liberty in social roles, recognizing that "[n]o longer is the female destined solely for the home and the rearing of family, and only the male for the marketplace and the world of ideas." *Stanton v. Stanton*, 421 U.S. at 14. *See also Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Mississippi University for Women*, 458 U.S. at 726 (heightened scrutiny serves to eliminate "fixed notions concerning the roles and abilities of males and females").[23]

Exacting as it is, this scrutiny escalates to the highest level where, as here, legislation that discriminates on the basis of gender also intrudes on basic interests in bodily integrity, procreation, health, family, and sometimes life itself. The "fundamental rights" branch of equal protection jurisprudence makes clear that, where legislation classifies with respect to such basic interests, any deference that would otherwise be given the legislature attenuates. Rather, such legislation may be upheld only if it survives the strictest and most searching kind of review. Thus, in *Skinner v. Oklahoma*, 316 U.S. 535, this Court applied strict scrutiny under the Equal Protection Clause to a compulsory sterilization law that discriminated among categories of thieves—a kind of line-drawing that otherwise would not have been suspect. Likewise, in *Zablocki v. Redhail*, 434 U.S. 374

23 The fact that an equal protection argument along these lines was not advanced in *Roe* itself is plainly explained in historical terms. At the time *Roe* was decided, this body of law was in its earliest stages: *Reed v. Reed*, 404 U.S. 71 (1971), the precursor to all of these decisions, was not decided until six months *after* the Court noted probable jurisidiction in *Roe*, *see* 402 U.S. 941 (1971); and in any event, *Reed* used the language of "rational relationship" review, rather than the heightened level of scrutiny that the Court has subsequently enforced.

(1978), the Court applied strict scrutiny under the Equal Protection Clause to a marriage restriction that discriminated against persons with outstanding child support obligations—again, a classification that would normally have been deferentially reviewed. If cases such as *Skinner* and *Zablocki* treat impact on the fundamental rights to procreate and to marry as escalating the standard of review from minimal to strict, then surely the impingement of abortion laws on procreation, health, marriage, and family interests should escalate judicial scrutiny the lesser distance from heightened to strict review. Thus, the gender-based discrimination worked by restrictive abortion laws should be reviewed strictly.

B. Restrictive Abortion Laws Classify on the Basis of Sex.

The direct impact of abortion restrictions falls, exclusively, on a class of people that consists *only* of women. Only women get pregnant; only women have abortions; only women will be forced to endure unwanted pregnancies and adverse health consequences if abortions are restricted; only women are injured by dangerous, illegal abortions where legal ones are unavailable; and only women will bear children if abortions are unavailable. *See Michael M. v. Sonoma County Superior Court*, 450 U.S. at 473 ("[V]irtually all of the significant harmful and inescapable identifiable consequences of teenage pregnancy fall on the young female.").

The fact that the laws do not mention "women" is irrelevant. A law restricting "all abortions" is the precise equivalent of a law restricting "all abortions sought by women."[24] A classification based on pregnancy is, by biological definition, a classification based on gender.[25]

24 This is an instance not of disproportionate impact but of exclusive impact. In *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), by contrast, the veterans' preference upheld by this Court disadvantaged a class that was not defined, as this one is, by a biological correlate of gender. As a result, although the classification disproportionately disadvantaged women, many men were also disadvantaged. *Id.* at 281 (Stevens, J., concurring).

25 *Geduldig v. Aiello*, 417 U.S. 484 (1974), to the extent that it suggests the contrary, is not controlling. *Geduldig* sustained the constitutionality of a

Moreover, abortion restrictions, like the most classic gender-based restrictions on women seeking to participate in the worlds of work and ideas, have historically rested on archaic stereotypes of women as persons whose "paramount destiny and mission . . . [is] to fulfill the noble and benign office of wife and mother." *Bradwell v. Illinois*, 16 Wall. 130, 142 (1873) (Bradley, J., concurring). Legislation prohibiting abortion, largely a

state disability insurance program that excluded from coverage certain disabilities resulting from pregnancy. In an opinion largely devoted to the insurance justifications for excluding pregnancy, the Court, in a footnote, cursorily rejected the view that excluding "pregnant women" from benefits accruing to "nonpregnant persons" constituted sex discrimination, for the beneficiaries "include[d] members of both sexes." *Id.* at 496 n.20.

Geduldig's force today is questionable, for it reflected a very early stage in the development of equal protection law governing gender discrimination, and its reasoning has since been rejected by Congress, *see* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (amending 42 U.S.C. § 2000e), attacked widely by commentators, *see* Law, *Rethinking Sex and the Constitution*, 132 U. Penn. L. Rev. 955, 984 nn.107-09 (1984) (collecting citations), and implicitly rejected by the line of subsequent decisions that treat laws as sex classifications even if they burden some but not all men, or some but not all women, *see, e.g., Califano v. Goldfarb*, 430 U.S. 199; *Weinberger v. Wiesenfeld*, 420 U.S. 636.

But even if *Geduldig* is still good law, the program it upheld is distinguishable from laws restricting abortion. Now-Chief Justice Rehnquist, writing for the Court in an analogous context in *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977) (deeming exclusion of pregnant employees sex discrimination under Title VII), established a distinction between "merely refus[ing] to extend to women a benefit that men cannot and do not receive," and "impos[ing] on women a substantial burden that men need not suffer." Like "depriv[ing female employees] of employment opportunities because of their different role [i.e., capacity to become pregnant]," abortion restrictions constitute an affirmative "burden," not an omission to extend a benefit as was the case in *Geduldig*. *Id.* (expressly distinguishing *Geduldig*'s Title VII analogue, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)); *cf. Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (invalidating under the Due Process Clause a school board regulation that required pregnant school teachers to take unpaid maternity leave five months before childbirth); *see id.* at 652 (Powell, J., concurring on equal protection grounds). Where a law imposes affirmative burdens on pregnant women alone, *Geduldig* thus should have no force. Abortion restrictions constitute sex-based classifications no less than would laws barring all pregnant women from appearing in public.

product of the years between 1860 and 1880, reflected *precisely* the same ideas about the natural and proper role of women as did the legislation of the same period—long-since discredited—that prohibited women from serving on juries or participating in the professions, including the practice of law.[26]

Perhaps not surprisingly, modern studies have found that support for laws banning abortion continues to be an outgrowth of the same sort of stereotypical notions that women's only appropriate roles are those of mother and housewife; in many cases, such laws have emerged as a direct reaction to the increasing number of women who work outside the home. *See generally* K. Luker, *Abortion and the Politics of Motherhood* 192-215 (1984); Luker, *Abortion and the Meaning of Life*, in *Abortion: Understanding Differences* 25 (S. Callahan & D. Callahan eds. 1984).[27] It is, of course, precisely such stereotypes, as they are reflected in legislation, that have over and over again been the focus of this Court's modern equal protection cases. *See, e.g., Frontiero v. Richardson*, 411 U.S. at 684; *Stan-*

26 *See, e.g.*, J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* 168-72 (1978). To many of the doctors who were largely responsible for the passage of abortion restrictions, "the chief purpose of women was to produce children; anything that interfered with that purpose, or allowed women to 'indulge' themselves in less important activities, threatened . . . the future of society itself." *Id.* at 169. The view of one such nineteenth century doctor drew the parallel even more explicitly: he complained that "the tendency to force women into men's places" was creating the insidious new idea that a woman's "ministrations . . . as a mother should be abandoned for the sterner rights of voting and law making." *Id.* at 105. *See generally* Brief of 281 American Historians as *Amici Curiae* Supporting Appellees at 17-20, *Webster*; *see also* L. Gordon, *Women's Body, Women's Right: A Social History of Birth Control in America* (1976).

27 Those involved in anti-abortion activities tend to echo the views of Justice Bradley in *Bradwell*: "that men and women, as a result of . . . intrinsic differences, have different roles to play. Men are best suited to the public world of work, whereas women are best suited to rearing children, managing homes, and loving and caring for husbands. . . . Mothering, in their view, is itself a full-time job, and any woman who cannot commit herself fully to mothering should eschew it entirely." Luker, *Abortion and the Meaning of Life*, at 31.

ton v. Stanton, 423 U.S. 7; *Weinberger v. Wiesenfeld*, 420 U.S. 636; *Califano v. Goldfarb*, 430 U.S. 199.

C. The Political Process Is Inadequate to Protect Access to Abortion for All Women.

"The Framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). This Court has long interpreted the Equal Protection Clause to require even-handedness in legislation, lest the powerful few too casually trade away for others key liberties that they are careful to reserve for themselves. For example, the Court once struck down under the Equal Protection Clause a law permitting castration of recidivist chicken thieves but sparing white-collar embezzlers the knife. *Skinner v. Oklahoma*, 316 U.S. 535. The implication of *Skinner* was that, put to an all-or-nothing choice, legislators would rather sterilize no one than jeopardize people like themselves. Thus equality serves as a backstop to liberty. *See id.* at 546 (Jackson, J., concurring) ("There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who are guilty of what the majority defines as crimes.").

Every restrictive abortion law has been passed by a legislature in which men constitute a numerical majority. And every restrictive abortion law, by definition, contains an unwritten clause exempting all men from its strictures. To rely on state legislatures to protect women against "abortion regulation reminiscent of the dark ages," *Webster*, 109 S. Ct. at 3058, ignores the fact that the overwhelming majority of "those who serve in such bodies," *id.*, like the Oklahoma legislators who supported sterilization for workingmen's crimes, are not directly affected *at all* by the penalties they are imposing. It is precisely in such cases that strict scrutiny is required, to protect against the very

real danger that those in power will too casually impose burdens on others, in this case on women, that they would not have imposed upon themselves.

That is particularly so where, as here, the women most likely to be affected are those whom the political process protects least well. A world without *Roe* will not be a world without abortion, but a world in which abortion is accessible according to one's constitutional caste. While affluent women will travel to jurisdictions where safe and legal abortion is available, paying whatever is required, restrictive abortion laws—and, with them, the life-threatening prospect of the back-alley abortion—will disproportionately descend upon "those without . . . adequate resources" to avoid them. *Griswold*, 381 U.S. at 503 (White, J., concurring). Those for whom the burdens of an unwanted pregnancy may be the most crushing—the young, the poor, women whose color already renders them victims of discrimination—will be the ones least able to secure a safe abortion.

In the years prior to *Roe*, "[p]oor and minority women were virtually precluded from obtaining safe, legal procedures, the overwhelming majority of which were obtained by white women in the private hospital services on psychiatric indications."[28] Women denied access to safe and legal abortions often had dangerous and illegal ones. Mishandled criminal abortions were, one detailed study found, the principal cause of maternal deaths in the 1960's,[29] and mortality rates for African-American women were as much as nine times higher than for

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28 Polgar & Fried, *The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law*, 8 Fam. Plan. Persp. 125 (1976). *See also* Pilpel, *The Abortion Crisis*, in *The Case for Legalized Abortion Now* 101 (Guttmacher ed. 1967) (93% of in-hospital abortions in New York State were performed on white women who were able to afford private rooms); Gold, *Therapeutic Abortions in New York: A 20 Year Review*, 55 Am. J. Pub. Health 964-65 (1965) (ratio of legal hospital abortions per live birth was five times more for white women than for women of color, and 26 times more for white women than for Puerto Rican women).

29 *See* Niswander, *Medical Abortion Practices in the United States*, in *Abortion and the Law* 53 (Smith ed. 1967).

white women.[30] In 1972, women of color accounted for sixty-four percent of the deaths associated with illegal abortions in this country.[31]

To trust the political process to protect these women is to ignore completely the lessons of history. Time and again, this Court has recognized its special duties to protect minorities whose rights can too easily be trampled by legislative majorities. For in such cases, there are no political checks: legislators can, without difficulty, "escape the political retribution that might be visited upon them if larger numbers were affected." *Railway Express*, 336 U.S. at 112-13 (Jackson, J., concurring). Or, if people like them were affected.

In sum, laws that restrict abortion discriminate on the basis of gender with respect to the most basic decisions of life itself. That alone is enough to justify strict scrutiny. And the fact that a return to a patchwork of restrictive abortion regulations would inevitably have a disproportionate impact on poor and minority women must surely trouble a Court concerned that government must serve all citizens, not just the privileged few.

III. ONLY THE MOST COMPELLING INTERESTS MAY JUSTIFY STATE INTERFERENCE WITH THE ABORTION RIGHT, AND ONLY WHERE SUCH REGULATION IS NARROWLY TAILORED TO THOSE INTERESTS.

The right to abortion is not, this Court has recognized, absolute, *Roe v. Wade*, 410 U.S. at 154—any more than the rights to free speech or to assembly or to religious freedom are absolutes. But government regulation that intrudes on the right to choose abortion, like other fundamental rights, can be justified only when necessary to serve compelling interests. *Id.* at 155; *see Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. at 634; *Griswold v. Connecticut*, 381 U.S. at 485. Strict scrutiny need not be fatal; as Justice O'Connor reiterated for the Court last Term, for

30 *See* Gold, *Therapeutic Abortions*, 55 Am. J. Pub. Health at 964-65.

31 Cates & Rochat, *Illegal Abortions in the United States: 1972-1974*, 8 Fam. Plan. Persp. 86, 87 (1976).

example, race-based affirmative action can satisfy even the most "searching judicial inquiry" so long as government offers " 'a strong basis in evidence for its conclusion that remedial action was necessary.' " *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706, 721, 730 (1989) (quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1976)). But in the absence of a similarly strong and particularized showing of necessity to a compelling purpose, laws burdening the abortion right must be struck down.

In *Roe v. Wade*, this Court identified two and only two state interests that could ever furnish a justification sufficiently powerful to override a woman's fundamental right to control her body: protecting the woman's health and protecting potential life.[32] Furthermore, *Roe* required that regulations furthering these interests be "narrowly drawn," 410 U.S. at 155, and thus that "the means chosen 'fit' th[ese] compelling goal[s] so closely that there is little or no possibility that the motive" was actually something different and less powerful. *Croson*, 109 S. Ct. at 721. By applying strict scrutiny, and thus limiting the circumstances in which these state interests could be found sufficiently compelling to outweigh the woman's right, this Court in *Roe* and in succeeding cases has fulfilled its most basic responsibility as a guardian of fundamental rights.

Fair application of this Court's precedents requires application of such strict scrutiny every time that a state non-trivially limits the freedom of women to choose abortion—whether that limitation is termed a "significant obstacle," a "direct interference," or an "undue burden." And this Court's precedents further require that such regulations be invalidated whenever they impose burdens unnecessary to further any compelling state interest, as do the laws enacted by Ohio and Illinois here.

32 *Cf. Croson*, 109 S. Ct. at 721 (limiting compelling justification for race-based affirmative action to one and only one state interest: remedying past discrimination).

A. Strict Scrutiny Properly Invalidates any Abortion Regulation Not Proven Necessary to Protect the Woman's Health or to Protect Potential Life.

In *Roe v. Wade*, this Court identified two state interests that might, under certain circumstances, be sufficiently "compelling" to limit a woman's fundamental right to choose abortion. The state, the Court found, "does have an important and legitimate interest in preserving and protecting the health of the pregnant woman," and "it has still *another* important and legitimate interest in protecting the potentiality of human life." 410 U.S. at 112.

But the mere invocation of these interests, at any time and for any purpose, is not enough to sustain state regulation. Quite the contrary, as Justice O'Connor recently stated for the Court in *Croson*, "the mere recitation of a 'benign' or legitimate purpose" is not enough when infringement of fundamental rights is at stake; under strict scrutiny, "simple legislative assurances of good intention cannot suffice." 109 S. Ct. at 724 (rejecting city council's general assertion of remedial purpose as inadequate to defend a minority business set-aside). It is not enough merely to assert an interest—in this case, protecting the woman's health or protecting potential life—that might in some cases be sufficiently "compelling" to survive strict scrutiny. Rather, under the exacting inquiry required by strict scrutiny, a court must evaluate how the government seeks to further that interest—specifically, whether regulations are narrowly tailored to serve the asserted compelling goals, and whether those goals were in fact the actual motivation for the regulation.

In *Roe*, the Court established a framework for applying this analysis that has fairly guided its decisions on abortion in the years since 1973. So long as abortion poses a smaller risk to the health of the woman than childbirth, the state cannot claim that a regulation of abortion is narrowly tailored to a compelling interest in protecting the woman's health and safety. 410 U.S. at 163. And until the point of "viability," when a fetus has the theoretical capacity for meaningful life outside the womb, the

state interest in potential life is not sufficiently compelling to justify restricting the woman's right to abortion. *Id.* at 163-64.[33]

Roe's trimester analysis provided a shorthand for evaluating precisely these balances. Until the end of the first trimester, mortality in abortion was less than mortality in normal childbirth; thus, only after that point, the Court held, was the state permitted to enforce regulations of the abortion procedure for the purpose of preserving the woman's health. And until the point of "viability"—between twenty-four and twenty-eight weeks when *Roe* was decided—the state's interest in preserving potential life was, the Court held, biologically and logically secondary to the woman's right to terminate her pregnancy.[34]

The *Roe* framework represents a fair balancing between the competing interests of the woman and the state. To hold that the state *never* has a compelling interest would make the abortion right different from other constitutional rights, none of which is absolute. But to hold that a state interest in potential life is equally compelling *throughout* pregnancy would leave a woman with no protection at all, and would make an utter mockery of the Court's recognition that the right to choose abortion is a protected liberty interest. Any regulation, even criminal prohibition, could then be justified by reference to this "compelling" state interest. Such a test would replace strict scrutiny with no scrutiny at all. Indeed, this was precisely how

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33 Even after viability, however, the state cannot proscribe abortion "when it is necessary to preserve the life and health of the mother." *Roe v. Wade*, 410 U.S. at 164.

34 Contrary to the claims of critics of the trimester approach, such an effort to create administrable shorthands for applying complex balances is standard constitutional practice. The First Amendment's protection of "speech," for example, no more tells judges to trifurcate public property into "public forums," "limited public forums," and "nonpublic forums," *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (per White, J.), than the Fourteenth Amendment's protection of "liberty" commands, or precludes, the trifurcation of pregnancy. The fact that *Roe* necessitates line-drawing likewise distinguishes it not at all from the myriad of rules relating to books, buses, teachers, and classrooms that has emerged to define the constitutional prohibition of establishment of religion. Yet one

Texas sought to justify the criminal prohibitions at issue in *Roe* itself. *See* 410 U.S. at 159. The balance struck by the Court, by contrast, has served in succeeding cases to " 'smoke out' " regulations that fit a stated health goal or interest in potential life too loosely to survive appropriately "searching judicial inquiry." *Croson*, 109 S. Ct. at 721.

The *Roe* framework has been not only sound in principle, but workable in practice. Changes in technology may occur, but are no reason to revise the standard of review established in *Roe*. For example, in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 435-36 (1983), the Court invalidated a second-trimester hospitalization requirement because changing medical technology had made early second-trimester abortions as safe as first-trimester abortions. The hospitalization requirement was not, therefore, narrowly tailored to promote women's health. To the extent that changes occur,[35] the solution is not the abandonment of *Roe*, any more than the invention of the telephone counseled abandonment of fourth amendment doctrines protecting "papers and effects." Rather, the solution must come in the accommodation of *Roe*'s core principles to changed circumstances.

To be sure, in the case of abortion, the Court's line-drawing proceeds in a climate of sharp political divisions across the

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would be hard pressed to argue that strict scrutiny ought to be abandoned in first amendment cases because difficult lines must repeatedly be drawn.

35 No change in technology has affected the boundary between the second and third trimesters. Notwithstanding criticism, *Roe*'s viability line has remained a relatively stable one. "Neonates less than 24 weeks gestational age [the earliest point cited in *Roe*] have close to a 0% survival rate. . . . [B]efore [the occurrence of the fixed biological threshold], the fetal organs, especially the lungs, are not sufficiently developed to permit extrauterine survival even with the most sophisticated technology currently available." *Fetal Extrauterine Survivability*, Report to the New York Task Force on Life and Law 3, 12 (1988). *See also* Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. at 1023-24 & n.245; Coulthard, *Maturation of Glomerular Filtration in Preterm and Mature Babies*, 11 Early Hum. Dev. 281-85 (1985); Hallman, *et al.*, *Exogenous Human Surfactant for Treatment of Severe Respiratory Distress Syndrome: A Randomized Prospective Clinical*, 106 J. Pediatry 963 (1985); K. Moore, *The Developing Human* 224 (1982).

nation. And under the tests articulated in *Roe*, the Court's competence to draw lines may sometimes seem challenged by medical and scientific developments. But that is the result of choices made not in 1973 when *Roe* was decided, but two centuries ago, in establishing our form of government:

> [O]ur duty to apply the Bill of Rights [does not] depend upon our possession of marked competence in the field where the invasion of rights occurs. . . . [W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

West Virginia Board of Education v. Barnette, 319 U.S. at 638-40.

B. Any Significant Regulatory Interference with the Abortion Right Triggers Strict Scrutiny.

The strict scrutiny required by *Roe v. Wade* must be applied whenever the abortion right is infringed. This Court has consistently applied strict scrutiny not only when abortion is criminalized, *see Roe v. Wade*, but also whenever regulations short of criminalization encumber it with significant delay, administrative hurdles, or expense. The only times this Court has applied lesser scrutiny are when government proceeds not by act but by omission: for example, when government decides to provide funds to poor women for childbirth, but not for abortion. *See Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).[36] But nothing in those cases so much

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36 In those cases, this Court held that omitting to subsidize abortion with public resources was a mere denial of benefits, not a governmentally imposed burden on a woman's fundamental right to choose abortion. The Court therefore upheld such selective subsidies on mere rational-basis review. *See Harris*, 448 U.S. at 325 (state action "encouraging childbirth except in the most urgent circumstances" held "rationally related to the legitimate governmental objective of protecting potential life").

as suggested that government has similar license when it would affirmatively burden a woman's choice. This Court's precedents make clear that, while it is one thing selectively to subsidize childbirth but not abortion, it is quite another affirmatively to tax, penalize, or deter that choice by regulatory means.

Where such regulatory interference is present, it does not matter what it is called. This Court has sometimes termed such interference "direct" or "significant" in order to clarify that the heavy artillery of strict scrutiny need not be called forth in instances of merely trivial or *de minimis* effect. Justice O'Connor has expressed a preference for the term "undue burden" to capture the very same concept.[37] The nomenclature is unimportant; what matters is that strict scrutiny be applied to all burdens that are significant by any name.

In identifying such burdens, whether they are termed "significant" or "undue," several principles are clear from this Court's precedents. First, it is not necessary that *all* women be burdened for a regulation to trigger strict scrutiny. While the legislation invalidated in *Roe*, for example, obviously constituted a significant interference or undue burden because it

37 In dissent in *Akron v. Akron Center for Reproductive Health*, Justice O'Connor argued that this Court's abortion cases should be read to require strict scrutiny only where the State imposes what she termed an "undue burden" on the abortion decision. 462 U.S. at 464-65. But as Justice O'Connor's own articulations make clear, inquiry into "undue burden" is simply a threshold inquiry into the quantity of the burden imposed. It serves to shield from the strictest scrutiny regulations whose actual impact on the abortion decision is trivial, or speculative, or both. The measure of whether a burden is "undue" is not whether it is justified, but whether it is significant.

Justice O'Connor herself could hardly have been clearer that the threshold "undue burden" inquiry is purely quantitative, not qualitative. For example, Justice O'Connor vigorously and explicitly rejected the United States' suggestion, in the *Akron* case, that the Court should "accord heavy deference to the legislative judgment" in determining what constitutes an "undue burden." Quite the contrary, she wrote, "[I]t is not appropriate to *weigh* the state interests at the threshold stage." *Id.* at 465 n.10.

Justice O'Connor has likewise been clear that once what she terms an "undue burden" has been found, the "exacting standard" of strict scrutiny is triggered—not some lesser standard of review. *See Akron*, *id.* at 463 (O'Connor, J., dissenting).

criminalized all abortions except those necessary to save the life of the mother, the prohibition of saline amniocentesis struck down in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), also constituted such an interference or burden—even though this burden was limited to women seeking second trimester abortions and notwithstanding that the overwhelming majority of abortions are performed in the first trimester. The same was true for the requirements of parents' or husbands' consent invalidated in *Danforth* and *Bellotti v. Baird*, 443 U.S. 622 (1979): these regulations were subject to strict scrutiny even though they would impose an "absolute obstacle" only to that narrow group of women who were both covered by the regulations (minors or married) and also unable to secure the requisite consent.[38] These holdings are sound, for the right recognized in *Roe* is a right possessed by every pregnant woman; a regulation that "drastically limits" the freedom of even one woman should trigger strict scrutiny. And surely if the regulation, by purpose or effect, imposes "coercive restraints" on the choice of a group of women—unfortunately, too often, those most vulnerable because of their age or their poverty or their race—then it should be no answer that older women, or richer women, or white women who live in cities are not really burdened at all.

Second, it is clear that the question whether a "significant interference" or "undue burden" is imposed must be considered from the perspective of the woman who is burdened. Because what matters is the obstacle facing the woman who is making the abortion decision, the only appropriate perspective from which the burden can be assessed is hers. *Cf. Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). The question is not whether a judge or a legislator or the law's perennial "reasonable man" would judge an increase in cost or a requirement of notification to be an "absolute obstacle;" the question is whether a pregnant woman, or girl, would. If burdens are to be assessed fairly, they can only be assessed from the

38 Justice O'Connor admits that these regulations constitute "undue burdens," notwithstanding the limitation of their impact to these relatively narrow groups of women. *See Akron*, 462 U.S. at 464 (O'Connor, J., dissenting).

perspective of the one who is, usually intentionally, being burdened.

This is not simply a question of a man's perspective versus a woman's, or, all too often, a girl's. It is not even simply a question of the comfortable versus, all too often, the poor and the desperate. Justice O'Connor recognized in *Akron* that the abortion decision is a " 'stressful one.' " 462 U.S. at 474 (O'Connor, J., dissenting) (quoting *Planned Parenthood v. Danforth*, 428 U.S. at 67). That recognition is reason to weigh all the more carefully any additional burden the state seeks to impose.

Finally, to assess the burden of an entire statutory scheme one provision at a time is plainly inconsistent with taking the proper perspective. Provisions that are not "significant obstacles" or "undue burdens" taken one by one are not experienced that way by the woman who may be subject to all of them.

Assessed according to these basic definitional principles, the regulatory schemes enacted by Ohio and Illinois in these cases are plainly subject to strict scrutiny, whether their impact on women is termed "significant" or simply "undue." And by that exacting standard, there can be no doubt they must fall.[39]

39 *Amici* leave detailed argument on these points to the Briefs of the Appellees in *Turnock v. Ragsdale* and *Ohio v. Akron Center for Reproductive Health*. That this brief is not filed in *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (en banc), *cert. granted*, 109 S. Ct. 3240 (1989) (Nos. 88-1125, 88-1309), reflects only the constraints of briefing schedules.

CONCLUSION

For these reasons, *amici* respectfully request that this Court reaffirm *Roe v. Wade* and affirm the judgments below in *Turnock v. Ragsdale* and *Ohio v. Akron Center for Reproductive Health*.

Respectfully submitted,

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APPENDICES

APPENDIX A

ABORTION RIGHTS COUNCIL (ARC)* was founded in 1968 and currently has 5000 members and 12,000 supporters in the State of Minnesota. It has as its sole purpose keeping abortions safe and legal for all women. ARC opposes any further restrictions on women's access to abortions and supports the principles established in *Roe* v. *Wade*.

ABORTION RIGHTS MOBILIZATION (ARM)* is a Section 501(c)(3) organization, which uses lawsuits, education, and other techniques "to implement and guarantee a woman's right to legal abortion as decreed by the United States Supreme Court," following ARM's bylaws.

AD HOC COMMITTEE OF 367 AMERICAN HISTORIANS is a group of professional historians who, from widely diverse perspectives and knowledge, are united in their conviction that *Roe* v. *Wade* is essential to women's liberty and equality and consistent with the most noble and enduring understanding of American history and traditions. Individual members of this Committee are set forth at Appendix B.

AD HOC COMMITTEE OF 491 SCIENTISTS AND PHYSICIANS is a group of distinguished scientists and physicians with advanced training and expertise in, among other fields, developmental biology, neurobiology, molecular biology, cellular biology, and obstetrics and gynecology. *Amici* have been recognized for their contributions to their respective fields. For example, thirty-one of them have received the Nobel Prize. *Amici* have a unique interest in seeing that scientific learning is not distorted or misused in arguments concerning abortion and therefore join in this brief supporting appellees. Individual members of this Committee are set forth at Appendix D.

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* Some *amici* have filed another *amicus* brief in *Ohio v. Akron Center for Reproductive Health*. *Amici* denoted by a single asterisk join this brief on behalf of appellees in the case of *Turnock* v. *Ragsdale*. A single asterisk will so indicate throughout this Appendix.

AD HOC COMMITTEE OF 497 AMERICAN LAW PROFESSORS includes law professors from institutions all over the United States who believe that the right of a woman to choose whether or not to bear a child, as delineated by this Court in *Roe* v. *Wade*, is an essential component of constitutional liberty and privacy commanding reaffirmation by this Court. They join this brief to underscore their belief in the fundamental importance of the right of privacy within the constitutional system and the centrality of reproductive freedom within that right. Individual members of this Committee are set forth at Appendix C.

AD HOC COMMITTEE OF 166 STATE LEGISLATORS is comprised of Representatives and Senators from thirty-two states who are united in the belief that it is a unique function of the judiciary to define and preserve individual rights. As legislators, *amici* depend upon the Supreme Court to delineate the constitutional boundaries within which to legislate. *Amici* join this brief steadfast in the conviction that identifying and defining the scope of constitutional protection for fundamental rights is the role of the judiciary, and not that of elected officials. Individual members of this Committee are set forth at Appendix E.

THE AFRICAN AMERICAN SUMMIT was created in 1989 to provide a forum to bring together African American leaders and grass roots people from throughout the nation to develop strategies and policies designed to promote the needs of and to address the major social and economic problems now facing African Americans, including the crucial issues of crime, drugs, abortion, and education. It monitors, evaluates, and disseminates information concerning contemplated, proposed, and existing legislation and policy which affects or could affect the interests of African Americans.

THE ALAN GUTTMACHER INSTITUTE (AGI) is an independent, nonprofit corporation for research, policy analysis and public education in the fields of reproductive health, population and broadly related areas of health and social policy. AGI's nonpartisan programs and activities are aimed at promoting public understanding, developing sound public policy and creating workable public and private sector programs that will enhance the ability of all women and men, in freedom and dignity, to exercise their rights and responsibilities with regard to reproduction and family formation.

ALBUQUERQUE MONTHLY MEETING OF THE RELIGIOUS SOCIETY OF FRIENDS. In considering the morality of abortion, Quakers' respect for the sanctity of life may come in conflict with Quakers' respect for the individual leanings of the spirit. In other ethical dilemmas faced in history, some Quakers have found that traditional Friendly testimony may have conflicted both with the prevalent beliefs of the community at large and their own personal revelations. The Quaker approach of holding contradictory positions in the light of God, in silence, until the sense of the spirit is felt, is where we begin. Albuquerque Monthly Meeting feels that a woman, or a couple, facing these conflicts may reach clearness to terminate a pregnancy. Since we believe it is beyond the scope of government to make this moral decision for her, a woman should not be prevented by legislation from having reasonable access to a medically safe abortion. If a woman is eligible for financial assistance from a governmental agency for medical care, then such assistance should apply to an abortion just as it applies to any other medical procedure.

ALL PEOPLE'S CONGRESS,* based in New York City, is a national organization with chapters in communities in many major cities whose women members are Black, Latino, Asian and Native American, students, lesbians, workers, unemployed, disabled, seniors, single heads of households and those on fixed incomes. It strongly supports a comprehensive federal program of guaranteed reproductive rights and health care for all women, which includes safe, legal, affordable abortion.

THE AMERICAN FRIENDS SERVICE COMMITTEE (AFSC) has a vital interest in this litigation because of Friends belief in the infinite worth of each human being and the equality of all human beings in the sight of God. Because of this testimony, the AFSC has worked since 1917 as a social justice arm

of the Religious Society of Friends to root out the causes of violence in our society which lie in poverty, exclusion and denial of equal opportunity and rights and to support rights of conscience. For two decades the AFSC has taken a consistent position supporting a woman's right to follow her own conscience concerning childbearing, abortion and sterilization. AFSC is deeply aware that the decision to terminate pregnancy is seldom an easy one. That choice must be made free of coercion, including the coercion of poverty, racial discrimination and unavailability of services to those who cannot pay.

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (AAUW),* a network of 140,000 college-educated women, promotes equity for women and girls. The AAUW supports the right of every woman and girl to safe and comprehensive reproductive health care. AAUW believes that decisions concerning reproductive health care are personal ones, and that the right to make informed decisions should be available to *all* women.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO (AFSCME) is a union of over one million public employees, including over 300,000 health care workers. AFSCME also represents thousands of workers in social service agencies caring for abused, neglected and abandoned children. Over half of AFSCME's members are women.

AMERICAN HUMANIST ASSOCIATION (AHA) is a national philosophical and religious organization which has a strong interest in this litigation because its members hold the preciousness, dignity and freedom of conscience of the individual person as central values. The AHA has long held that freedom of conscience on abortions is a fundamental right of all women, and that any government action to limit that right is both an intolerable invasion of individual liberty and autonomy and an improper expansion of the power of the state.

THE AMERICAN JEWISH CONGRESS,* an organization of American Jews founded in 1918, is fully committed to protecting the right of all women to exercise reproductive choices. While it believes that involving parents in the choices of their

teenage daughters is desirable, it believes that such involvement cannot be mandated by law, because study after study demonstrates that these laws are wholly ineffective, even, in many cases, counterproductive.

THE AMERICAN JEWISH COMMITTEE (AJC)* is a national organization founded in 1906 for the purpose of protecting the civil and religious rights of Jews. The AJC believes that this goal can best be accomplished by helping to preserve the constitutional rights of all Americans. The AJC supports access to abortion on a voluntary basis as an important component of comprehensive and effective health care and as a part of its traditional concern for individual liberty, privacy, and free choice.

AMERICAN PUBLIC HEALTH ASSOCIATION (APHA)* is a national organization devoted to the promotion and protection of personal and environmental health and to the prevention of disease. Founded in 1872, APHA is now the largest public health organization in the world, with over 50,000 members, including fifty-one state and local affiliate organizations. The APHA represents all disciplines and specialties in public health, including both patients and health professionals such as physicians, nurses, health educators, and family planning specialists.

AMERICAN VETERANS COMMITTEE, INC. (AVC),* founded in 1943, is a national organization of veterans who served honorably in the Armed Forces of the United States in World War I, World War II, the Korean War, or the Vietnam War. AVC has filed *amicus* briefs in many court cases expressing AVC's strong belief that discrimination based on race, color, religion, sex, or national origin is detrimental to our Nation. AVC believes that the United States Constitution entitles a pregnant women, in light of her unique burden of pregnancy, to determine whether to terminate her pregnancy.

AMERICANS FOR DEMOCRATIC ACTION (ADA), a progressive, independent political organization, is a national coalition of civil rights and feminist leaders, academicians, business people and trade unionists, grass roots activists, elected offi-

cials, church leaders, professionals, members of Congress and many others. ADA is dedicated to the achievement of freedom, equality of opportunity, economic security and peace for all people through education and political action.

AMERICANS FOR RELIGIOUS LIBERTY is a nationwide non-denominational educational organization dedicated to defending the constitutional principles of religious freedom, freedom of conscience, and separation of church and state.

ASSOCIATION OF REPRODUCTIVE HEALTH PROFESSIONALS (ARHP) is a national nonprofit organization comprised of physicians, nurses, and other providers of reproductive health care services. ARHP's major purpose is to improve the quality of reproductive health care through professional and public education. The experience of ARHP and its members is that sound reproductive health care requires the ready availability to all women of childbearing age of a full range of modern medical services. These include, in addition to high quality obstetric care, contraceptives, genetic screening, counseling, and safe and legal abortion.

THE BEVERLY HILLS BAR ASSOCIATION (BHBA)** is a voluntary bar association formed on December 2, 1931 which currently has 3000 members. The members of BHBA practice in and around the City of Beverly Hills, California. BHBA is committed to the protection of individual liberties and to the promotion of respect for the legal system. BHBA believes that a reversal of the landmark decision in *Roe v. Wade* would impinge on individual liberties and would undermine public confidence in the legal system.

THE BLACK WOMEN'S AGENDA, INC. (BWA), in Washington, D.C., is a coalition of national Black women's organizations dedicated to equity and equality for Black women and their families. The BWA firmly believes that reproductive freedom is essential to our advancement.

** *Amicus* joins this brief on behalf of appellees in the case of *State of Ohio* v. *Akron Center for Reproductive Health* only. A double asterisk will so indicate throughout this Appendix.

B'NAI B'RITH WOMEN (BBW)*** is an organization of 120,000 Jewish women who, since 1968, have advocated the right of women to choose for themselves on matters of reproduction. As members of a minority religion, BBW members are especially sensitive to keeping the state from restricting religious freedom, and as women BBW members have particular concerns about preserving their rights. Basic to the right of every woman is that of deciding when and whether to have children, and so BBW firmly supports upholding these rights as outlined in *Roe* v. *Wade*.

BUFFALO LAWYERS FOR CHOICE is an organization currently of approximately fifty attorneys—men and women—formed in 1989 in Buffalo. All attorneys in the organization practice in Buffalo. Although they are from diverse backgrounds and practices, the group's members all have supported the right of women to choose abortion and have supported the equality between men and women. Buffalo Lawyers for Choice intends to continue as an active organization supporting local groups that protect individuals' ability to control their bodies and their lives. Many of the members have been active in the past in Planned Parenthood of Buffalo and Erie County and in national Planned Parenthood organizations, as well as civil liberties organizations. Because of an intense interest in the rights of women and men to make their own decisions about reproductive issues, Buffalo Lawyers for Choice wishes to be recognized as an *amicus* in these cases.

CALIFORNIA WOMEN LAWYERS (CWL)* is an organization of several thousand women lawyers founded in 1973 for the primary purpose of improving the situation of women in the State of California. CWL is committed to all issues affecting a woman's right to choice, lobbying against various parental consent bills and working with a broad-based coalition to encourage funding and support for programs supportive of choice.

*** *Amicus* has filed another *amicus* brief in the above-captioned cases, focusing on separate issues, but wishes to join this brief especially to support *Roe* v. *Wade*. A triple asterisk will so indicate throughout this Appendix.

CANADIAN ABORTION RIGHTS ACTION LEAGUE (CARAL). The main purpose of CARAL is to ensure that no woman in Canada is denied access to safe, legal abortion. Our aim is to keep abortion out of the *Criminal Code*. We want to see the establishment of comprehensive contraception and abortion services, including appropriate counseling across the country. We regard the right to safe, legal abortion as a fundamental right.

CATHOLICS FOR FREE CHOICE (CFFC)*** is an independent national membership organization established in 1974. One of CFFC's objectives is to protect the legal right of all women and girls to act as moral agents in decisions related to sexuality and reproductive health care without coercive legal or quasi-legal interference by religious institutions. As Catholics, CFFC members support policies of strict separation of church and state based not only on the United States Constitution, but also on the Roman Catholic Declaration on Religious Liberty (*Vatican II Dignitatis Humanae*, 7 December 1965) which declares, ". . . the civil authority must see to it that the equality of the citizens before the law, which is itself society, is never violated either openly or covertly for religious reasons and that there is no discrimination among its citizens."

CENTER FOR POPULATION OPTIONS (CPO)* is a national nonprofit organization dedicated to the prevention of unintended adolescent pregnancy and too-early childbearing. CPO develops programs to increase opportunities for young people through education, comprehensive health care, and the access to family planning services.

THE CENTER FOR WOMEN POLICY STUDIES (CWPS), founded in 1971, was the first national policy research and advocacy institute focused exclusively on issues of women's social and economic rights. The Center's current programs include the National Resource Center on Women and AIDS, the first national effort focused exclusively on women, particularly low income women and women of color; a key concern is the potential abrogation of women's reproductive rights in the name of protecting public health. CWPS also is conducting the

second stage—policy implementation and public education—of the Reproductive Laws for the 1990s Project. Finally, our Young Women's Project seeks to bring women in their twenties into the policy process and will address issues of reproductive choice from their perspectives.

THE CENTRE COUNTY WOMEN'S RESOURCE CENTER provides services to victims of sexual assault and domestic violence. It is the Center's firm philosophy and policy that, with the exception of mandated child abuse reporting, all people seeking services have the right to absolute privacy and confidentiality with respect to their personal lives, decisions, and bodily integrity. This philosophy and policy extends to people of all backgrounds, regardless of their age.

CHICAGO CATHOLIC WOMEN is an organization committed to working toward structural change within church and society in order to promote the full giftedness and personhood of women and a world of justice for all. We know that a woman's choice regarding her body must be respected. We have heard the pain of women who had illegal abortions before 1973 and we will work to keep a woman's choice legal.

CHILD CARE LAW CENTER,* in San Francisco, California, is the only legal services organization in the country exclusively dedicated to expanding the supply of affordable, quality child care. It has a particular emphasis on serving the needs of low-income women, and as such it strongly supports the rights of low-income women to have equal access to health services, including abortion.

CHOICE (CONCERN FOR HEALTH OPTIONS: INFORMATION, CARE AND EDUCATION). For almost twenty years, CHOICE has been an educator, consumer advocate, counselor and information resource in the areas of reproductive health, sexuality and maternity care. Because of its background and experience in public education and counseling, CHOICE was selected by the City of Philadelphia to operate its city-wide hotline for information on AIDS. CHOICE, through its information hotlines, teen improvisational theater company, training center and publications, has pursued an organizational

philosophy that decisions regarding sexuality and reproduction are highly personal, and that those very private choices should not be constrained by private or public intimidation, economic or social status, lack of relevant information or unwarranted governmental interference.

CHOICE ATTORNEYS NETWORK, subscribes to the general statement of interest of *amici*, *supra*, at p. 2.

CHOICE, INC., subscribes to the general statement of interest of *amici*, *supra*, at p. 2.

CHOICES WOMEN'S MEDICAL CENTER* is a New York State licensed medical facility serving over 30,000 patients a year in the New York City area for family planning, abortion, and prenatal care. Since its founding in 1971, Choices Women's Medical Center has been at the forefront of insuring high quality feminist women's health care for its patients and fighting politically to retain the right to choose.

THE COALITION OF LABOR UNION WOMEN (CLUW) is a national membership organization of women and men who are members of more than sixty-five International Unions. CLUW has forty-five active chapters throughout the United States and a National Executive Board composed of the female leadership of these International Unions. A primary purpose of this national coalition is to unify all Union Women in a viable organization dedicated to the achievement of participation of women within their unions and to remove all forms of discrimination from the workplace.

COLORADO WOMEN'S BAR ASSOCIATION is a nonprofit professional association of more than 600 Colorado lawyers and law students. Open to all attorneys regardless of sex, the CWBA was founded in 1977 to promote the highest standards of the legal profession; to advance justice; to promote, advance, and protect the interests and welfare of women; and to pursue these goals through appropriate legal, social, and political action. The CWBA supports reproductive freedom, and opposes any infringement on a woman's constitutional right of privacy to make her own reproductive choices.

THE COLUMBIA-GREENE RAPE CRISIS CENTER, based in New York, was founded in 1981. It assists approximately 400 women per year who have been the victims of sexual assault, their families and friends, to overcome the trauma of sexual assault. It also serves 7000 community residents per year through its sexual abuse prevention project. Pregnancy can result from any number of situations, many of which do *not* include "irresponsibility" on the part of the woman. The Rape Crisis Center sees many unwanted pregnancies resulting from sexual crimes and supports a woman's freedom of choice over her personal medical and emotional concerns, including the right to terminate an unwanted pregnancy.

THE COMMITTEE OF INTERNS AND RESIDENTS (CIR)* is the nation's oldest and largest housestaff union, representing over 5000 interns, residents and fellows in New York, New Jersey, and Washington, D.C. For over thirty years, the CIR's struggle to improve residents' working conditions has been inseparable from its fight for quality patient care. The CIR strongly supports the right of all women to safe, legal birth control and abortion.

THE COMMITTEE TO DEFEND REPRODUCTIVE RIGHTS (CDRR-CMRW), founded in 1977, is a San Francisco-based grass roots organization with a nationwide membership of almost 2000 people. CDRR-MRW and its membership advocate the right to legal, affordable, and safe abortion services for all women, regardless of their age, race, income level, or sexual preference. CDRR-CMRW considers abortion a vitally important and needed health service and a constitutionally-protected right for all women.

CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC.,* with over 400 members, is a nonprofit public interest law firm advocating women's rights. As an organization working for equality, we believe that every woman, without regard to age, religious belief, income, race or disability, must be able to control her own health and reproduction.

THE D.C. RAPE CRISIS CENTER was established in 1972 to provide services to sexual assault survivors. The Center is inter-

ested in these cases because we maintain a strong concern for issues that affect women, particularly low-income and women of color. We believe that issues of economics, health, justice, education, etc. are all intertwined. Though our primary focus is violence against women, we consistently support actions that promote justice for women, which includes the right to reproductive freedom.

THE D.K.T. MEMORIAL FUND is a private organization based in Washington, D.C. which supports and supervises family planning projects, primarily in developing countries, including the provision of birth control options for men. The DKT Memorial Fund is dedicated to the furtherance of a woman's right to reproductive freedom, including the right to choose abortion.

DOMESTIC VIOLENCE CENTER OF CHESTER COUNTY is an organization which provides a hotline, safe housing, and comprehensive counseling to battered women. The Center served 743 women and 144 children between July 1987 and June 1988. A great many of the women served are single parents with low incomes. These women must struggle to procure fair access to health care services. We strongly oppose inequitable treatment for low-income women denied fair access to medical services including abortion.

EPISCOPAL WOMEN'S CAUCUS* is deeply disturbed over the increasingly bitter and divisive battle being waged in legislative bodies to force continuance of unwanted pregnancies and to limit an American woman's right to abortion. We believe that all should be free to exercise their own consciences on this matter and that where widely differing views are held by substantial sections of the American religious community, the particular belief of one religious body should not be forced on those who believe otherwise. To prohibit or severely limit the use of public funds to pay for abortions abridges and denies the right to an abortion and discriminates especially against low income, young, and minority women.

EQUAL RIGHTS ADVOCATES, INC. (ERA) is a San Francisco-based public interest legal and educational corporation founded in 1974 that is dedicated to securing economic, social, and political equality for women. It has a long history of interest, activism, and advocacy in all areas of law which affect equality between the sexes. ERA believes that the right to control one's reproductive life is fundamental to women's ability to gain equality in other aspects of society. This concern has been expressed through our participation as counsel and as *amicus* in numerous cases involving women's reproductive rights, including *Committee to Defend Reproductive Rights v. Meyers*, 29 Cal.3d 252 (1981) and related cases.

THE FEDERATION OF FEMINIST WOMEN'S HEALTH CENTERS is a nonprofit association of women's health projects and supporters. The network of women-controlled health clinics share staff, training and resources to advocate, promote and protect reproductive rights for all women. Approximately 15,000 women, at least ten to twenty percent of whom are minors, receive abortion services at our health clinics yearly. The Federation's goal is to enable women to make informed choices about their health care and reproduction through the provision of self-help health education and gynecological services, including abortion, well-women care and birth-control. We work together and with others to ensure that all women have the information and power to control their bodies and their lives.

FEDERATION OF RECONSTRUCTIONIST CONGREGATIONS AND HAVUROT.* Although the Jewish tradition regards children as a blessing, the tradition permits the abortion of an unborn child to safeguard the life and physical and mental health of the mother. The rabbis did not take a consistent stand on the question of whether a fetus resembles "a person." They did not think it possible to arrive at a final theoretical answer to the question of abortion, for that would mean nothing less than to be able to define convincingly what it means to be human. We recognize that abortion is a tragic choice. Any prospective parent must make an agonizing decision between competing claims—the fetus, health, the need to support oneself and one's family, the need for time for a marriage to stabilize, responsibility for other children and the like. Some of us consider abor-

tion to be immoral except under the most extraordinary circumstances. Yet we sympathize with the anguish of those who must make the decision to abort or not to abort.

THE FEMINIST INSTITUTE promotes social change that ensures women's autonomy and independence. Our women's health policy and pro-choice projects promote public policies that ensure women's control over their own bodies. We are concerned that, as women become free from subjugation to patriarchal control within the family, they in turn not become subject to state control of their reproduction. Control over one's own body is fundamental to the exercise of personal autonomy, without intervention or restriction by the government.

FLORIDA ASSOCIATION FOR WOMEN LAWYERS, DADE CHAPTER, was founded in 1979 and is comprised of over 600 members. The Association is dedicated to the preservation of women's rights, including the right to make decisions about whether and when to have children.

FOSSIL FUELS POLICY ACTION (FFPA) is concerned about the effects of present fossil fuels production and consumption, primarily that of pollution, and secondarily, but importantly, the worsening of energy security. FFPA supports advancing and safeguarding the right—and what should be the requirement—to provide information on population and environment to all consumers, notably expectant mothers and teenagers, in the context of added consumers' impact on—and unhealthy future in—our fossil fuels intensive society and economy. Restricting abortions in early pregnancy aggravates population pressures on the environment and on finite resources. This does not mean abortion should be a preferred means of birth control or of limiting population.

FRESNO FREE COLLEGE FOUNDATION* is a community organization with offices in Fresno, California. Its origin in 1968 is connected to an academic freedom case and, since that time, it has, in various ways, been supportive of academic freedom and the civil liberties of students, professors, and citizens.

FUND FOR THE FEMINIST MAJORITY is a nonprofit organization with supporters nationwide and offices in Arlington, Virginia, and Los Angeles, California, dedicated to eliminating sex discrimination and to the promotion of equality, women's rights, and a feminist agenda including legal, safe and accessible abortion and birth control. The Fund is also a producer of educational materials to enhance public understanding of the need for legal abortion to further public health.

THE GAY MEN'S HEALTH CRISIS, INC. (GMHC), based in New York City, is the nation's oldest and largest community-based AIDS service, education and advocacy organization. As of January 1989, approximately four percent of GMHC's 2,471 active clients were women. The majority of our female clients are women of color. GMHC is concerned that our female clients and women in general affected by the HIV epidemic be able to make their own medical decisions and that one option that must be available is a safe and legal abortion regardless of a woman's financial status.

HADASSAH is a women's Zionist organization representing over 385,000 members. It supports the principle of individual freedom as guaranteed by the Constitution, and opposes any regulations that diminish that freedom. In this respect, Hadassah regards freedom of choice as a matter of privacy of the individual to be determined by each woman in accordance with her religious, moral, and ethical values.

HARVARD WOMEN'S LAW ASSOCIATION BOARD was founded in 1969. It is currently celebrating its twentieth year at Harvard Law School, where women have been students for thirty-eight years. Most of the almost 700 women currently attending Harvard Law School attend some Women's Law Association events; many participate in the Battered Women's Project which the Women's Law Association co-sponsors. Over 200 women, almost one-third of the women at Harvard Law School, are paying, voting members of the Women's Law Association. Among the Women's Law Association's objectives are informing the law school and the broader community about

issues of concern to all women at Harvard Law School and promoting women's rights, such as the right to choose an abortion.

HAWAII WOMEN LAWYERS• is dedicated to the improvement of the status of women attorneys and the support of issues of concern to all women, so as to promote the advancement of all women.

THE HAWAII WOMEN LAWYERS FOUNDATION is a professional organization of women and men attorneys and others. One of its main purposes is to advance the status of women in the community. Members have been involved in many projects which aid women lawyers and women in the community in general. Foundation members are aware that women's right to choose abortion is constitutionally protected. Women must have the right to reproductive freedom if they are to have physical control over their own bodies. Without reproductive autonomy, women can neither control the course of their lives nor participate equally in society. The Hawaii Women Lawyers Foundation supports reproductive freedom for women and opposes any and all efforts to limit women's right to choose abortion.

THE HUMAN RIGHTS CAMPAIGN FUND is a lobbying organization representing the national gay and lesbian community. Since its founding nearly ten years ago, the Campaign Fund has been committed to working toward full civil rights for lesbians and gay men and ultimately for all Americans. In pursuit of this goal, we are interested in any governmental actions—legislative, judicial, or administrative—that could affect civil rights.

ILLINOIS WOMEN'S AGENDA (IWA), founded in 1975, is a statewide coalition of organizations and individuals committed to full equality and justice for women. Current IWA membership consists of several hundred individual members and over fifty affiliated organizations, representing 80,000 women throughout Illinois in the fields of law, academia, labor, and business, among others. The IWA develops and participates in

a wide range of programs for women through research, public education, and advocacy.

THE INTERNATIONAL AGENCY FOR MINORITY ARTISTS AFFAIRS (IAMAA) is a nationwide membership organization based in New York City which serves as an arts, cultural and social services agency. One of our primary concerns is the promotion of women's rights. Our founder is Queen Mother Moore, who is now ninety-one years of age, and Ms. Flo Kennedy, attorney and feminist leader. The Executive Board of the IAMAA fully supports the freedom of choice of women pertinent to abortion and stands firmly against any modification of the *Roe* decision.

INTERNATIONAL FUND FOR HEALTH AND FAMILY PLANNING (IFHFP) is a private foundation based in Washington, D.C., which supports and supervises family planning projects, primarily in developing countries. These programs include the provision of a wide variety of contraceptive and birth control options for women and men around the world. The IFHFP is dedicated to the furtherance of women's rights to reproductive freedom, including the right to choose abortion.

INTERNATIONAL LADIES' GARMENT WORKERS UNION (ILGWU) is an international labor organization of approximately 175,000 members located in thirty-three states of the United States. More than eighty-five percent of its members are women, many of whom are minorities, and a substantial majority of whom are of child-bearing age. Many of the women members live at a low income level. ILGWU is dedicated, among other principles, to the elimination of gender discrimination, the promotion of women in the workplace, and the constitutional guarantees declared in *Roe v. Wade.*

INTERNATIONAL PROJECT ASSISTANCE SERVICES (IPAS) is a non-governmental, charitable organization based in Carrboro, North Carolina, that works around the world, and especially in developing countries, toward safe reproductive health care for women. It provides training, information, and other educational services regarding access to and delivery of comprehensive health services, especially abortion. In countries

where abortion is restricted, IPAS works within prevailing cultural, legal and social contexts to reduce the maternal morbidity and mortality associated with unsafe abortion practices. In countries where abortion services are not so restricted, IPAS works to improve access to safe abortion services.

INSTITUTE FOR COMMUNITY RESEARCH has as its mission the improvement of the quality and availability of critical information to underserved people in the Hartford, Connecticut capital area and beyond. The Institute supports the right of poor women and women of color to information about abortion and other reproductive health issues, and to the constitutional right to reproductive health self-determination, including the right to abortion and abortion counseling, and appropriate financing to support these choices.

THE INSTITUTE FOR WOMEN'S POLICY RESEARCH (IWPR) is an independent, nonprofit, scientific research institution established to respond to the need for women-centered, policy-oriented research. IWPR conducts research that addresses the full spectrum of issues that impact on women's lives—with sensitivity to and consideration for diversity based on race, ethnicity, and class. The focus of the Institute's research is both national and international in scope. In all aspects of its endeavors, IWPR is committed to expanding access, strengthening relationships, and fostering partnerships which strengthen the economic, social, and political well-being of all women. IWPR gives its full support to the *amicus curiae* brief in these cases. IWPR urges the Court to uphold women's right to reproductive choice because, among other reasons, women's right to reproductive choice is a key element in their ability to achieve economic equity.

INSTITUTE FOR WOMEN TODAY, subscribes to the general statement of interest of *amici*, *supra*, at p. 2.

THE JESSIE SMITH NOYES FOUNDATION is a private foundation committed to preventing irreversible damage to the natural systems upon which all life depends. The Foundation makes grants in the closely interrelated areas of environment and population. The Foundation, therefore, believes that

reproductive rights are essential to achieving a balance between environment and population as well as for the individual dignity of women.

JEWISH COMMUNITY AGENCIES. Having long sought to insure the protections afforded by the Constitution and the Bill of Rights, the following Jewish community agencies join this *amicus* brief. The Jewish community shares with others the reverence for life on the one hand, and the pluralistic society's concern for individual rights and religious liberty on the other. Within the Jewish community itself, there is a spectrum of positions on the matter of abortion. For this reason, we believe that the Supreme Court should retain the rules set forth in *Roe* v. *Wade* so that the abortion decision can be made by individual women in accordance with their own religious and moral views, consulting with their physician and spiritual advisors.

AKRON JEWISH COMMUNITY FEDERATION
ALBUQUERQUE JEWISH COMMUNITY COUNCIL
ATLANTIC COUNTY FEDERATION OF JEWISH AGENCIES
AUSTIN JEWISH COMMUNITY COUNCIL
BINGHAMTON JEWISH FEDERATION OF BROOME COUNTY
CANTON JEWISH COMMUNITY FEDERATION
CENTRAL NEW JERSEY JEWISH FEDERATION
CHARLESTON JEWISH COMMUNITY COUNCIL
CINCINNATI JEWISH COMMUNITY FEDERATION
CLIFTON-PASSAIC JEWISH FEDERATION
COLUMBIA COMMUNITY RELATIONS COUNCIL OF JEWISH WELFARE FEDERATION
COLUMBUS COMMUNITY RELATIONS COMMITTEE OF JEWISH FEDERATION
COMMUNITY RELATIONS COUNCIL OF JEWISH FEDERATIONS OF PALM BEACH COUNTY
DELAWARE VALLEY JEWISH FEDERATION
EASTERN CONNECTICUT JEWISH FEDERATION
ELMIRA COMMUNITY RELATIONS COMMITTEE OF JEWISH WELFARE FUND

EL PASO JEWISH COMMUNITY RELATIONS COMMITTEE
ERIE JEWISH COMMUNITY COUNCIL
FLINT JEWISH FEDERATION
FORT WORTH JEWISH FEDERATION
GREATER BOSTON JEWISH COMMUNITY RELATIONS COUNCIL
GREATER BRIDGEPORT JEWISH FEDERATION
GREATER BUFFALO JEWISH FEDERATION
GREATER DALLAS JEWISH COMMUNITY RELATIONS COUNCIL OF JEWISH FEDERATION
GREATER DANBURY COMMUNITY RELATIONS COMMITTEE OF JEWISH FEDERATION
GREATER DAYTON COMMUNITY RELATIONS COUNCIL OF JEWISH FEDERATION
GREATER DES MOINES JEWISH FEDERATION
GREATER FORT LAUDERDALE JEWISH FEDERATION
GREATER HARTFORD COMMUNITY RELATIONS COMMITTEE OF JEWISH FEDERATION
GREATER KANSAS CITY JEWISH COMMUNITY RELATIONS BUREAU
GREATER KINGSTON JEWISH FEDERATION
GREATER MIAMI JEWISH FEDERATION
GREATER MIDDLESEX COUNTY JEWISH FEDERATION
GREATER NEW ORLEANS JEWISH FEDERATION
GREATER NORWALK JEWISH FEDERATION
GREATER ORANGE COUNTY JEWISH FEDERATION
GREATER ORLANDO JEWISH FEDERATION
GREATER PHILADELPHIA JEWISH COMMUNITY RELATIONS COUNCIL
GREATER SAN JOSE JEWISH COMMUNITY RELATIONS COUNCIL
GREATER SEATTLE JEWISH FEDERATION
GREATER WASHINGTON JEWISH COMMUNITY COUNCIL
GREATER WILKES-BARRE JEWISH FEDERATION
INDIANAPOLIS JEWISH COMMUNITY RELATIONS COUNCIL

JACKSONVILLE JEWISH FEDERATION
JEWISH COMMUNITY RELATIONS COUNCIL OF INDIANA
LEXINGTON CENTRAL KENTUCKY JEWISH FEDERATION
LOS ANGELES COMMUNITY RELATIONS COMMITTEE OF JEWISH FEDERATION COUNCIL
LOUISVILLE JEWISH COMMUNITY
MADISON JEWISH COMMUNITY COUNCIL
MARBLEHEAD NORTH SHORE JEWISH FEDERATION
MEMPHIS JEWISH COMMUNITY COUNCIL RELATIONS COUNCIL
METROPOLITAN DETROIT JEWISH COMMUNITY COUNCIL
METRO WEST UNITED JEWISH FEDERATION
MILWAUKEE JEWISH COUNCIL
NEW HAVEN JEWISH FEDERATION
NORTHEASTERN NEW YORK UNITED JEWISH FEDERATION
NORTHERN NEW JERSEY JEWISH COMMUNITY RELATIONS COUNCIL
OKLAHOMA CITY JEWISH COMMUNITY COUNCIL
PEORIA JEWISH FEDERATION
PITTSBURGH COMMUNITY RELATIONS COMMITTEE OF UNITED JEWISH FEDERATION
PORTLAND JEWISH FEDERATION
PORTLAND SOUTHERN MAINE JEWISH FEDERATION-COMMUNITY COUNCIL
PROVIDENCE COMMUNITY RELATIONS COMMITTEE OF RHODE ISLAND JEWISH FEDERATION
RICHMOND JEWISH COMMUNITY FEDERATION
ROCHESTER JEWISH COMMUNITY FEDERATION
SACRAMENTO JEWISH COMMUNITY RELATIONS COUNCIL
SAN ANTONIO JEWISH COMMUNITY RELATIONS COUNCIL OF JEWISH FEDERATION
SAN FRANCISCO JEWISH COMMUNITY RELATIONS COUNCIL
SAVANNAH JEWISH COUNCIL

SCRANTON-LACKAWANNA JEWISH FEDERATION
SOUTH BEND JEWISH FEDERATION OF ST. JOSEPH VALLEY
SOUTH BROWARD JEWISH FEDERATION
SOUTH COUNTY JEWISH FEDERATION
SOUTHERN NEW JERSEY JEWISH COMMUNITY RELATIONS COUNCIL
SPRINGFIELD (ILLINOIS) JEWISH FEDERATION
SPRINGFIELD (MASSACHUSETTS) JEWISH FEDERATION
STAMFORD UNITED JEWISH FEDERATION
SYRACUSE JEWISH FEDERATION
TIDEWATER UNITED JEWISH FEDERATION
TULSA JEWISH COMMUNITY COUNCIL
UTICA JEWISH FEDERATION
WATERBURY JEWISH FEDERATION
WILMINGTON JEWISH FEDERATION OF DELAWARE
WORCESTER JEWISH FEDERATION
YOUNGSTOWN JEWISH COMMUNITY RELATIONS COUNCIL OF JEWISH FEDERATION

JEWISH LABOR COMMITTEE objects to any governmental attempts to interfere in the exercise of individual religious conscience with regard to procreative choice. Because we recognize the many divergent theological answers to the questions raised by abortion, we agree that each woman should be free to consult with her religious convictions, as well as her best medical advice, without government coercion or constraint when exercising religious and personal conscience in making a decision whether to terminate her pregnancy.

THE JUDICIAL CONSENT FOR MINORS LAWYER REFERRAL PANEL* is a volunteer association of over 200 Massachusetts lawyers who for the last eight years have represented more than 6000 pregnant minors seeking judicial consent for an abortion (in lieu of parental consent) under Mass. Gen. Laws ch. 112,/12S.

THE JUVENILE LAW CENTER (JLC)* is a public interest law firm that has provided free legal services to children in

Pennsylvania since 1975, represented hundreds of abused and neglected children in Philadelphia Family Court, and been involved in numerous federal and state cases aimed at vindicating the rights of children who are served by the government. Many JLC clients have been teenage parents. Based upon its experience and expertise with teenage girls, JLC wishes to bring to the Court's attention facts concerning the medical risks and societal cost of teenage pregnancy and childbearing, and to urge that the Court uphold the fundamental right to choose abortion recognized in *Roe v. Wade*.

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.,* founded in 1973, is the nation's oldest and largest national legal advocacy organization working in furtherance of the rights of lesbians and gay men. As an organization representing the lesbian and gay community's belief in the constitutional right to liberty and bodily autonomy, Lambda strongly supports the position that women in our society are constitutionally entitled to make their own decisions about whether to choose abortion.

LAWYERS CLUB OF SAN DIEGO, INC.* is a California bar association founded in 1972 with a current membership of almost 700 men and women, most of whom practice and reside in San Diego County, California. The purpose of the Lawyers Club is "to advance the status of women in the law, to support and improve the administration of justice and to promote equality of the sexes in our society." The rights of liberty and privacy are key to equality of the sexes. Lawyers Club believes that any encroachment on the protections afforded by the Constitution and *Roe v. Wade* would destroy the fundamental rights of women to control their pregnancies and their bodies.

LAWYERS FOR REPRODUCTIVE RIGHTS (LRR) is a nonprofit organization located in Philadelphia, Pennsylvania which represents more than 700 members of the five-county legal community and is actively helping to organize affiliate groups across Pennsylvania and in New York City. LRR believes that lawyers have a special and significant role to play in opposing governmental interference in the private lives of

individuals and in educating the legal community and the general public about legal issues of reproductive rights.

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES (LWVUS)* is a nonpartisan, nonprofit membership organization with members in state and local Leagues in all fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands. The LWVUS strongly believes that public policy in a pluralistic society must affirm the constitutional right of privacy of the individual to make reproductive choices. The LWVUS further believes that the *Roe v. Wade* decision is an important protection of this constitutional right.

MARIE STOPES INTERNATIONAL, founded in 1973, is the largest non-governmental provider of family planning services in Britain, and supports full-service birth control programs in fifteen other countries, including India, Sri Lanka, Indonesia, the Philippines, Bangladesh and Kenya. In all countries in which it works, the organization is deeply concerned with the administrative, legislative and judicial issues that restrict the fundamental human right of the individual to all forms of birth control.

THE METRO D.C. COALITION FOR CHOICE in Washington, D.C., has as its purpose the mobilization of local support for the reproductive rights of all women and to represent the unique needs of the residents of the District of Columbia in the area of reproductive rights. Women of color make up a large percentage of the D.C. population, so we feel it is important to endorse this brief.

THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (MALDEF) is a national civil rights organization based in Los Angeles and established in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. In this context, MALDEF has advocated on behalf of Hispanic women for equality of access to health services and facilities. Any restriction on a woman's right to choose an abortion will have a disproportionate impact on the Hispanic community's

self-determination and ability to obtain equality of opportunity.

MICHIGAN REPUBLICANS FOR CHOICE PAC in Grand Rapids, Michigan is a statewide organization of approximately 1000 men and women. They support the right of a woman to decide when to bear children and when not to bear children. They believe in the right to privacy and believe that right is supported in the Constitution.

MISSOURI WOMEN'S NETWORK* is a banding together of Missouri organizations and individual women and men to facilitate communication, promote education, and to strengthen advocacy for women's issues based on the 1977 National Plan of Action for Women (adopted in Houston).

MOBILIZATION FOR YOUTH HEALTH SERVICES, INC.* is concerned that the erosion of *Roe v. Wade* will lead us back to the days where social class and ability-to-pay were highly determinative of whether choice was available and, if available, whether that choice was exercised under conditions of hygiene, care, and skill normally accepted as standard for the medical profession. Social realities being what they are, the victims of the curtailment of an essential right for women would be millions of disadvantaged and poor women in the United States.

THE MS. FOUNDATION FOR WOMEN is the nation's only public, multi-issue, women's fund. The Foundation has long recognized that the extent to which women can control their reproductive capacities is a principal factor in determining the quality and character of their lives; this is especially true for poor women and women of color, who are often the first victims of anti-choice legislation. The Ms. Foundation for Women has been responding to attacks on reproductive freedom with a combination of grantmaking, technical assistance, and advocacy since its founding almost fifteen years ago.

NA'AMAT. Reproductive choice must be recognized as a matter of individual conscience outside the realm of government intrusion. We oppose attempts—whether by Constitutional

amendment, legislation, judicial review, or governmental regulation—to restrict women's access to safe and legal abortion or to violate the confidentiality of family planning services.

THE NATION INSTITUTE, of New York City is a nonprofit foundation founded in 1966 which undertakes research, educational programs and other projects concerned with civil rights and civil liberties, particularly those protected by the First Amendment. The Supreme Court Watch project of The Nation Institute is an example of our commitment to these isssues.

NATIONAL ABORTION FEDERATION** is a professional membership organization of abortion providers representing 300 clinics, doctors' offices, and hospitals throughout the United States and Canada.

THE NATIONAL ABORTION RIGHTS ACTION LEAGUE (NARAL) has 350,000 members in thirty-seven state affiliates and the national organization. Founded in 1969, NARAL is the largest national organization dedicated solely to keeping abortion safe, legal, and accessible. NARAL recognizes that guaranteeing women the full range of reproductive choices is critical to women's autonomy and equality.

NATIONAL ASSEMBLY OF RELIGIOUS WOMEN (NARW)* is a twenty-year old national organization of Catholic feminist women committed to working and acting collectively to build a world of peace with justice. NARW's agenda emphasizes the "participation of people in the decisions which affect their lives" and calls upon its members to use their organized power to effect a just society. NARW affirms the equal access of all women to the law, and opposes efforts to make abortion a crime. NARW believes that its position is based on gospel values of respect for life, respect for persons' self determination, fidelity to conscience, and the right to due process of law.

THE NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN REPRODUCTIVE HEALTH (NANPRH) was founded in 1980 for the purpose of assuring accessible quality family planning services which guarantee reproductive freedom

to all women, and to promote and protect the delivery of family planning services by nurse practitioners. NANPRH's 800 members believe that the abortion decision is one that must be made by the woman and her health practitioner.

THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC. (NASW),* a nonprofit professional association with over 120,000 members, is the largest association of social workers in the United States. Founded in 1955, NASW has chapters in every state as well as the Virgin Islands, Puerto Rico, and Europe. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession and to improving the quality of life through the utilization of social work knowledge and skill. NASW is deeply committed to the principle of self-determination and to the protection of individual rights and personal privacy. The Association has been in the forefront of the struggle for women's equality, and is particularly concerned in the present instance that the state not override a pregnant women's autonomy nor restrict her right to choose abortion.

NATIONAL ASSOCIATION OF WOMEN LAWYERS (NAWL), founded in 1899, is a voluntary national membership organization of the legal profession, having official representation in various organizations, commissions and governmental agencies, both national and international. It is comprised of approximately 1200 individual members and numerous women's bar association affiliate members (encompassing several thousand additional members) across the country. Its individual members, from each state and the District of Columbia, include prosecutors, public defenders, private attorneys, trial and appellate judges from the state and federal courts, legislators, law professors, and law students. Although the members of the NAWL hold a broad spectrum of views, they share a common concern that the law be administered justly, fairly, and predictably. As an organization made up primarily of women, it has and continues to be a supporter of women's rights. As an organization of attorneys, it supports the integrity of the justice system.

NATIONAL BLACK WOMEN'S HEALTH PROJECT (NBWHP). Based in Atlanta, Georgia, the project was founded as a self-help and health advocacy organization to improve the chronically poor and declining health status of Black women and their families. Today it consists of a network of eighty-eight developing and established chapters in twenty-four states, serving a broad based constituency of almost 2000 members. The purpose of NBWHP is the definition, promotion, and maintenance of health for Black women, including full reproductive rights, the essential authority of every woman to choose when, whether, and under what conditions she will bear children. Because too many single family households in the United States are headed by Black women living in poverty, possessing less educational and job training opportunities, enduring inadequate, often nonexistent child care services, subject to substandard housing conditions, and lacking access to appropriate health services of any kind; wherefrom, more than half of all Black children are poor, born of mothers receiving inferior, if any, prenatal care, suffering the highest rate of infant mortality and neonatal deaths in the Western world; and because we lack fail-safe birth control methods, adequate human sexuality education, and suffer also the highest rate of teenage pregnancy in the Western world, we firmly insist upon continued access to safe, legal and affordable abortion. Restrictive abortion laws exacerbate the low socioeconomic status of women of color and passage of such laws will further impugn the dignity of Black womanhood, leaving sterilization as the only publicly funded and permanent birth control method available to women of color. The lives of Black and other women of color will be disproportionately damaged as we are forced to rely on publicly funded health facilities where they exist.

NATIONAL COALITION OF AMERICAN NUNS, subscribes to the general statement of interest of *amici*, *supra*, at p. 2.

NATIONAL COALITION OF 100 BLACK WOMEN* is a nonprofit consortium of professional African American women with a shared goal of improving the quality of life for black women and their families. The coalition endorses this

brief because, regardless of our individual views on abortion, we must have the right to choose and we must have that right protected.

NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS (NCWBA) is a nonprofit professional organization of 50,000 female and male attorneys. Membership is open to all individual state, regional, and local bar associations. The NCWBA was formed in 1981 to promote the highest standards of the legal profession, to advance justice, to promote and protect the interests of women, and to pursue these goals through appropriate legal, social and political action.

NATIONAL COUNCIL FOR RESEARCH ON WOMEN* is an independent association of established centers and organizations that provide institutional resources for feminist research, policy analysis, and educational programs for women and girls. The Council also works to strengthen ties with other national and international organizations and coalitions. Through its member centers and affiliates, the Council links over 2000 women and men scholars and practitioners in this country and abroad and serves constituencies that include government, the media, business and industry, and the nonprofit sector, as well as the academic community and the general public.

NATIONAL COUNCIL OF JEWISH WOMEN,* founded in 1893 and numbering 100,000 members across the United States, is dedicated, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. It has adopted a National Resolution to work for the "protection of every female's right to choose abortion, and the elimination of obstacles that limit reproductive freedom."

NATIONAL COUNCIL OF NEGRO WOMEN (NCNW) is an umbrella organization of national organizations. It was founded in 1953 by Mary Bethune. From its inception NCNW has sought to harness the collective strengths of Black women in the struggle for civil and human rights. It has half a century of civil rights leadership and public service on behalf of women and their families in the U.S. and developing African countries.

Teenage pregnancy is one of many of the current program emphases. NCNW embraces thirty-three national organizations and 254 chartered community based sections with an outreach to four million women in all walks of life whose mission is inspired by Mary Bethune to 'Leave No One Behind.'

NATIONAL EDUCATION ASSOCIATION (NEA) is a nationwide employee organization with a current membership of some 1.9 million members, the vast majority of whom are employed by public education institutions. One of the principle purposes of NEA is to protect the constitutional rights of its members, approximately 60% of whom are female. By action of its Representative Assembly, which is NEA's highest governing body, NEA expressly supports the right to reproductive freedom, which is implicated in this case.

NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION (NFPRHA)* is a nonprofit membership corporation designed to improve and expand the delivery of comprehensive family planning and reproductive health care information and services throughout the United States. NFPRHA represents over eighty-five percent of the agencies and organizations that operate family planning programs with funds received under Title X of the Public Health Services Act of 1970.

NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC. (BPW/USA) is the world's oldest and largest organization of working women. Founded in 1919, and with 125,000 members in 3,400 local organizations across the country, BPW/USA promotes full participation, equity, and economic self-sufficiency for working women. BPW/USA includes among its members men and women of every age, religion, race, political party, and socio-economic background. BPW's platform commits us to "support reproductive freedom as a right for all women."

NATIONAL FEDERATION OF TEMPLE SISTERHOODS represents the women of Reform Judaism. It is the women's affiliate of the Union of American Hebrew Congregations, and comprises more than 100,000 members among its affiliate sis-

terhoods. We believe that the right of choice is a personal one based on religious, ethical, or cultural beliefs and values. This right should not be determined for women based on the convictions of any special interest group. For government to legislate in the matter of abortion violates a woman's fundamental right to privacy and choice, and is an impermissible derogation of the separation of church and state. We therefore reaffirm our support of the Supreme Court decision of 1973 relating to abortion.

NATIONAL GAY AND LESBIAN TASK FORCE (NGLTF)* is a national membership advocacy and political organization to protect and advance civil and social rights of lesbians and gay men. Founded in 1973, NGLTF has 15,000 members, and offices in Washington, D.C. NGLTF strongly supports the reproductive freedom of all women and the expansion of fundamental right to privacy of all people in the area of reproductive and sexual decision making. Bodily integrity is an essential aspect of reproductive decisions and sexual privacy.

NATIONAL GAY RIGHTS ADVOCATES (NGRA)* is a non-profit public interest law firm founded in 1978. NGRA engages in impact litigation throughout the country on behalf of lesbians and gay men. Today, NGRA has over 20,000 members from every state and the District of Columbia. Preserving the constitutional rights to liberty and privacy, rights that are principle components of a woman's right to choose abortion, are of fundamental concern to NGRA's work and its membership. If these essential rights are eroded, lesbians and gay men will also be denied equal participation in American society.

NATIONAL MEDICAL ASSOCIATION (NMA). Founded in 1895, the NMA is the oldest black organization in the United States and has a membership of over 16,000 black and minority physicians representing all states in the union. As stated in the NMA's constitution, one of its purposes is: "the elimination of religious, racial, sexual discrimination and segregation from American medical institutions by means of an effective organization of the medical profession within the states and territories of the United States."

NATIONAL ORGANIZATION FOR WOMEN (NOW)* is the largest feminist organization in the United States. Fundamental to NOW's purpose is the right of women to control their own bodies and to determine if and when to bear children. Women's right to reproductive freedom impacts not only their right to privacy, but also their health and freedom.

NATIONAL ORGANIZATION FOR WOMEN LEGAL DEFENSE AND EDUCATION FUND (NOWLDEF) is a nonprofit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOWLDEF was founded in 1971 by the leaders of the National Organization for Women.

NATIONAL REPUBLICAN COALITION FOR CHOICE (NRCC), founded in 1989 in the wake of the *Webster* decision, is a nonprofit, political organization dedicated to the promotion of pro-choice candidates within the Republican party and the furtherance of a pro-choice platform.

NATIONAL SOCIETY OF GENETIC COUNSELORS (NSGC) is a professional membership organization representing more than 750 genetic counselors in North America. Founded in 1979, the NSGC adopted the following pro-choice policy in 1987: "the NSGC, as an organization, publicly supports a woman's right to reproductive freedom including her right to prenatal diagnosis and access to safe and legal abortion."

THE NATIONAL WOMEN'S CONFERENCE COMMITTEE, formerly the IWY Continuing Committee of the 1977 First National Women's Conference (Houston, Texas), is the nonprofit, all-volunteer Committee working to implement the National Plan of Action adopted by 2000 delegates representing every state and territory, mandated by Congress to adopt recommendations to advance the status of women of the United States and to monitor progress on this National Plan of Action. Guaranteeing reproductive freedom to all women is one of the twenty-five priority planks in the National Plan of Action. Four hundred seventy members were appointed to the IWY Continuing Committee. Currently we are joined in our advocacy for women's rights by fourteen statewide networks and many individual grassroots supporters.

NATIONAL WOMEN'S LAW CENTER is a Washington-based legal organization which has been working since 1972 to advance and protect women's legal rights. The Center's primary goal is to ensure that public and private sector practices and policies better reflect the needs and rights of women. The fundamental right to abortion recognized in *Roe* v. *Wade* is of profound importance to the lives, liberty, health, and safety of women throughout the country. Because of the tremendous significance to women of the freedom to choose whether to bear children, the National Women's Law Center seeks to preserve women's right to abortion.

NATIONAL WOMEN'S POLITICAL CAUCUS (NWPC) is a nonprofit organization supporting the appointment and election of women to public office. NWPC also supports legislative initiatives at the states and national levels to insure fairness and equity for all Americans. As an organization comprised of white women and women of color working together, we recognize and work to overcome the particular problems faced by women of color, particularly those who are poor, in receiving adequate health care and in safeguarding their right to choice in reproductive decisions.

NEW JERSEY WOMEN'S LAWYERS ASSOCIATION (NJWLA) is a statewide independent bar association made up of direct membership and county women's bar affiliate associations throughout the state. The purposes of the NJWLA are to comment and testify on legislation affecting women, endorse and promote the selection of women to appointments to the judiciary and other positions of leadership and to maintain liaisons with other women's professional and business organizations.

NEW ORLEANS ASSOCIATION FOR WOMEN ATTORNEYS is an organization comprised of lawyers and judges, female and male, from the greater New Orleans area. Our organization is dedicated to the advancement of women in the legal

profession and the promotion and protection of legal rights for all women in our community. Our membership recently voted eighty-four percent to sixteen percent to adopt a pro-choice position. Accordingly, in an effort to promote legal rights of women in our society, we join this brief.

NEW YORK CITY COMMISSION ON THE STATUS OF WOMEN was established by Mayoral Executive Order in 1975 to advise the Mayor of New York City on issues affecting the city's 3.5 million women, to support and promote the rights of women in the private and public sectors of New York City and to advocate change to promote women's equality. In carrying out this mandate the Commission reviews and advocates for and against legislation at the Federal, State and City levels.

NEW YORK STATE COALITION AGAINST DOMESTIC VIOLENCE* is a membership organization of battered women's shelters, safe home projects, counseling and advocacy organizations and individuals committed to empowering women and helping them to lead violence-free lives. The Coalition believes in women's rights to choice and in the accessibility of services to all women, regardless of economic status. This includes every woman's right to reproductive choice and to medical assistance.

NEW YORK STATE COALITION ON WOMEN'S LEGAL ISSUES (COWLI) is a statewide organization established to identify and eradicate gender bias which is pervasive in our society. Among its other purposes, COWLI offers practical and substantive expertise and commentary on the effects on women of existing laws and proposed legislation. COWLI also provides special assistance to the courts by drawing attention to the deleterious effects on women of biased implementation of laws. COWLI is particularly concerned with these cases because they focus on the critical issue of reproductive freedom. COWLI is committed to ensuring reproductive freedom for all, as well as gender equality in the courts.

NEW YORK STATE REPUBLICAN FAMILY COMMITTEE is an educational advocacy organization devoted to promoting policies that foster maximum individual liberty and freedom of

choice, particularly in matters of health. Founded in 1984, the Committee has over 300 Republican party members with ninety-nine percent residing in New York State. Its membership includes lawyers, health care professionals, business people, educators, philanthropists, and numerous civic and political leaders.

NEW YORK UNIVERSITY LAW WOMEN is an organization of female law students. As a legal organization for women, we are committed to maintaining legal rights for other women and for ourselves. Through such projects as the Battered Women's Project and the Women in Prison Project, we face the inequitable treatment of women of color and low-income women by the legal system. On behalf of ourselves as women of a variety of races and income levels and on behalf of those we seek to assist, we strongly oppose any further restrictions on the rights of women to take control of their own lives and bodies.

NEW YORK WOMEN IN CRIMINAL JUSTICE* is an organization of women whose members include police, probation and correction officers; judges, attorneys, and social workers; others who work in the criminal justice system; inmates and ex-offenders. Our main concerns are that offenders who go through the system not come out worse than when they went in, and that as many offenders as possible be diverted from the system. We also strongly support the right of a woman to choose abortion, knowing that the offspring of women in prison become the dysfunctional children in school and often the criminals of the future. The right to abortion should not be restricted to only those women who can afford abortions (whether or not they remain legal); the right to choose should be available to all women, most especially those who understand the heavy burden that would be imposed upon both the children and the women in and just out of prison.

NORTH CAROLINA ASSOCIATION OF WOMEN ATTORNEYS (NCAWA) is a nonprofit corporation founded in 1978 whose objects are the promotion of the participation of women in the legal profession and the promotion of rights of women under the law. The NCAWA has been instrumental in the pas-

sage of laws affecting women on issues such as domestic violence, equitable distribution of marital property, and child support enforcement. There are approximately 1700 women attorneys in North Carolina and almost one third of all new applicants are women. We believe it is the obligation of all women attorneys, as well as the stated objective of our organization, to act as advocates for women's rights. In 1979 the NCAWA adopted a resolution endorsing the right of all women to exercise their reproductive freedom to carry their pregnancies to term with adequate prenatal care or to have an abortion. Based on this resolution and on our objectives, the NCAWA joins in this *amicus* brief.

NORTH CAROLINA EQUITY (NCE)* is a nonprofit organization dedicated to the economic advancement of women. NCE serves as a catalyst on women's issues and advances networking of women. We support women's full realization and exercise of their most basic legal rights, including a woman's right to control her own body. This right must include her right to choose abortion.

NORTHERN PROVINCE, MORAVIAN CHURCH IN AMERICA believes in the sacredness of life and in the quality of life, and that abortion should not be used as a method of birth control nor as a means of controlling population and that the Christian faith calls us to reaffirm the freedom of persons as well as the sanctity of life, the members of the Moravian Church believe that abortion should be a matter of responsible personal decision, with continuing counseling provided if desired.

NORTHWEST WOMEN'S LAW CENTER is a private, nonprofit organization in Seattle, Washington, that works to advance the legal rights of women by means of litigation, legislation, education and providing information and referrals. Protecting women's freedom of reproductive choice is one of the Law Center's priority issue areas. The Law Center has participated in several cases involving reproductive rights before the United States Supreme Court and other courts.

PATHFINDER FUND, founded in 1957 and based in Watertown, Massachusetts, is dedicated to ensuring the availability of family planning services throughout the developing world. Its activities include the development of new service delivery mechanisms, local institution building, training health care providers, and providing contraceptive supplies. In both the United States and overseas, it addresses public policy issues that affect the availability of safe and effective family planning services.

PEOPLE FOR THE AMERICAN WAY (PFAW), is a nonpartisan, education-oriented citizen's organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to the nation's heritage of tolerance and pluralism, PFAW now has 275,000 members nationwide. The organization's primary mission is to educate the public on the vital importance of the democratic tradition and to defend it against attacks from those who would seek to limit our constitutional and civil liberties enshrined in the Bill of Rights, particularly our First Amendment and privacy rights.

POPULATION COMMUNICATION is an international, nonprofit organization which communicates population and environmental messages to world leaders through books, reports, mailings, news releases, and motion pictures. During the last twelve years, it has obtained the support of forty-eight world leaders for a Statement of Population Stabilization.

POPULATION CRISIS COMMITTEE (PCC), based in Washington, D.C., seeks to increase public awareness of the need for the reduction of population growth rates through voluntary family planning. PCC supports privately funded projects in developing countries that provide medical training in the treatment of abortion complications and menstrual regulation procedures. PCC conducts authoritative analyses of United States population assistance programs, one of which has been a comprehensive study of the impact of current United States abortion restrictions on family planning programs overseas.

POPULATION SERVICES INTERNATIONAL is a nonprofit organization that provides contraceptive and health marketing

and communications services in several developing countries. As such, it has a particular concern for the limitations that prevent individuals from learning about, or choosing, family planning.

QUEEN'S BENCH OF THE SAN FRANCISCO BAY AREA* is a bar association in the San Francisco area designed to promote the interests of women attorneys. Founded in 1921, it has almost 700 members. Queen's Bench is joining this brief because of its concern in maintaining the fundamental legal principles affecting women that were established in *Roe* v. *Wade*.

RADICAL WOMEN is the oldest socialist feminist organization in the United States. Formed in 1968, it has eight United States branches and one in Australia. The community-based organization includes working women, young and elderly women, women of color, and lesbians. The battle for women's rights, including the right to safe and accessible abortions, is crucial to women's equality, socially, politically, and economically. The right to abortion is a fundamental right of privacy and for the Court to interfere is a grave injustice. The abolition of *Roe* v. *Wade*, or any changes whatsoever, will especially affect low income women, namely women of color, who will not be able to obtain private services found by other women who can afford to pay.

RAINBOW LOBBY is an independent citizen's lobby working to strengthen and preserve democracy nationally and internationally. The majority of people in the United States support the right of a woman to choose abortion. The Lobby is concerned about the enormous gap between the concerns of the majority of people in this country, i.e., for abortion rights for all women, and the public policy actually legislated by Congress. Our elected officials are more and more unaccountable to ordinary citizens, their constituents, and thus we don't hear any outcry from Congress against the Court's decision in *Webster*. The pro-choice majority in this country support *Roe* v. *Wade*. That position needs to be reflected in our public policy.

RELIGIOUS COALITION FOR ABORTION RIGHTS is composed of thirty national religious organizations—Protestant, Jewish, and other faith groups. We hold in high respect the value of potential human life; we do not take the question of choice lightly. Because each denomination and faith group represented among us approaches the issue of choice from the unique perspective of its own theology, members hold widely varying viewpoints as to when abortion is morally justified. It is exactly this plurality of beliefs which leads us to the conviction that the abortion decision must remain with the individual, to be made on the basis of conscience and personal religious principles, and free from governmental interference. Therefore we reaffirm the Supreme Court ruling of 1973, *Roe* v. *Wade*, which permits a woman to make a decision regarding abortion based on her own conscience and religious beliefs. We oppose efforts to enact into secular law one particular religious doctrine on abortion or the beginning of human life.

REPRODUCTIVE HEALTH SERVICES (RHS) is a Missouri nonprofit, federal tax exempt corporation with its principal office in St. Louis, Missouri. RHS offers to its patients a broad range of counseling, gynecological and family planning services, including the provision of contraceptive and abortion services. RHS provides abortion services up to twenty-one weeks "gestational age," up to one-third of which are offered at a reduced fee, and is the largest abortion provider within the State of Missouri.

ROUTH STREET WOMEN'S CLINIC, subscribes to the general statement of interest of *amici*, *supra*, at p. 2.

SAN FRANCISCO WOMEN LAWYERS ALLIANCE* is a progressive, activist bar association that was founded in 1983 to provide a vehicle through which women lawyers could address women's issues and enhance the position of women in our society. One of the issues of particular concern to our membership is freedom of choice and reproductive rights for all women.

SANTA BARBARA WOMEN'S POLITICAL COMMITTEE (SBWPC) is a political action committee with over 300 members. SBWPC was formed in 1987 with a commitment to

increasing the role of women in the political and governmental processes of Santa Barbara and the state of California. The Committee is also committed to furthering the interests of women as a group through the political process. Issues such as reproductive choice, pay equity and child care are central to our concerns. Because the protection of the constitutional right of reproductive choice is our top priority for 1989, we are especially interested in the resolution of *Ragsdale* and *Akron* by the United States Supreme Court.

SIERRA CLUB, founded in 1982, is a nonprofit conservation organization with approximately 500,000 members nationwide. The goals of the Sierra Club are, among others, to participate and promote responsible uses of the earth's ecosystems and resources, and to educate and enlist all people to protect and restore the quality of the natural and human environment. The Sierra Club's interest in the right of reproductive choice is based on the longstanding belief that achieving population stabilization is essential for the long-term protection of the environment in every nation of the world, including the United States.

SOUTHERN CALIFORNIA WOMEN'S LAW CENTER (SCWLC) was established in 1989 as the first Law Center in Southern California devoted solely to the civil rights of women and girls. Protection of the right to reproductive freedom contained in the Constitution is one of the most significant legal issues facing women today. The SCWLC has a significant interest in the current appeals and extensive background in the issues presented to the Court.

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (SCLC) is an international, civil and human rights organization, composed of individual members, chapters, and affiliates. Founded in 1957, by the Reverends Martin Luther King, Jr., Joseph E. Lowery, and Ralph Abernathy, the SCLC is committed to the advancement of minorities and disadvantaged people in American society and the world, so as to ensure full participation in the social, economic, educational, and political arenas. SCLC works to achieve this mission through nonviolent means, which include litigation and demonstration. We,

SCLC, join this brief in recognition that the right of planned parenthood, whether and when to have children, is an integral part of the attainment of civil rights and should be fully guaranteed by the Supreme Court as the arbiter of our constitutional rights.

ST. LOUIS CATHOLICS FOR CHOICE sees decisions about reproduction as a very important aspect of our moral lives and separate from our decisions about our sexual lives. We see the availability of safe legal abortions as necessary for practical and humanitarian reasons. We value motherhood too highly to view it merely as a biological process which must not be interrupted once started. We affirm women as fully human, competent moral agents capable of making responsible choices in matters of reproduction.

STUDENTS AND YOUTH AGAINST RACISM* is a national organization based in New York City with chapters nationwide whose women members include students and youth from many communities. It supports the right of all women to terminate a pregnancy through abortion, without restrictions, if they so choose. To deny safe, legal abortion would seriously harm the health of and discriminate against untold numbers of young women, especially the poor, unemployed, and Black, Latino, Asian, and Native Americans, who, without the funds to obtain safe abortions, would have to resort to dangerous health-threatening procedures.

TARRANT COUNTY TEXAS CHOICE NETWORK is a coalition formed in 1983 and dedicated to keeping abortion safe and legal and to assuring reproductive freedom for all women, regardless of age or economic status.

TRANSNATIONAL FAMILY RESEARCH INSTITUTE (TFRI) is a multidisclipinary, nongovernmental, and nonprofit research organization in the behavioral sciences. TFRI develops and conducts research in reproductive behavior, often in cooperation with colleagues abroad. Research interests focus on the behavioral regulation of fertility, motivations for pregnancy resolution, and the decision making process. TFRI currently has offices in Palo Alto, California; Copenhagen, Denmark;

Mexico City, Mexico; and Bangkok, Thailand. Since 1972, the Institute has published *Abortion Research Notes*, reviewing scientific literature related to pregnancy termination.

TUSCON WOMEN'S COMMISSION• was founded in late 1975 by the Mayor and Council of the City of Tuscon to assist women in attaining full equality of all opportunity in all aspects of life. The Commission also maintains that public policy in the best interest of women will support a full range of options, information, and services so that every woman has the ability to make her own decision about when, whether, and under what conditions to bear a child.

UNION OF AMERICAN HEBREW CONGREGATIONS (UAHC) is the national congressional body of Reform Judaism comprising approximately 1.3 million members from over 830 Reform synagogues throughout the United States and Canada. To deal with issues of public policy, UAHC maintains a Commission on Social Action in cooperation with other arms of Reform Judaism. At its 1975 biennial convention, General Assembly delegates voted overwhelmingly to support the constitutional right of a woman to obtain an abortion if she freely chooses to do so, as determined by the Supreme Court in the 1973 landmark decisions of *Roe* v. *Wade* and *Doe* v. *Bolton*. In 1981, at the fifty-sixth General Assembly of the UAHC the delegates reaffirmed this position declaring that women must be free to exercise their moral and religious conscience regarding abortion.

UNITARIAN UNIVERSALIST WOMEN'S ASSOCIATION (UUWA) is a voluntary religious association of 1000 congregations in the United States and abroad dedicated to the principles of free faith, the right to an individual conscience and to the promotion of the inherent worth and dignity of every person. UUWA has long advocated the right of every woman to decide whether she should bear a child. We believe that the issue of abortion is morally complex and thus must be decided by each individual and remain a legal option. UUWA firmly believes that circumscription or prohibition of the right to terminate a pregnancy by qualified medical practitioners is an affront to

human life and dignity. In the last two decades, UUWA has repeatedly affirmed its belief that women of any age or marital or economic status have the right to have an abortion upon medical/social consultation of her choosing.

UNITED CHURCH OF CHRIST BOARD OF HOMELAND MINISTRIES, See statement below.

UNITED CHURCH OF CHRIST COORDINATING CENTER FOR WOMEN, See statement below.

UNITED CHURCH OF CHRIST OFFICE OF CHURCH AND SOCIETY (UCC) has, for almost two decades, supported a woman's right to choose safe, legal abortions and we deplore the willingness of many legislators, at all levels, to restrict the access of poor women to safe, comprehensive reproductive health care with a full range of options. Therefore, the seventeenth General Synod of the UCC reaffirms its historic and courageous leadership in support of freedom of choice as legally supported by *Roe* v. *Wade*, and urges all parts of the church to work toward a society where the full range of reproductive options are available to all women regardless of economic circumstances and to address the root causes that lead to unplanned pregnancies and lack of life options. Furthermore, the UCC deplores the *Webster* decision and believes that the decision severely limits major provisions of *Roe* v. *Wade*, undermining the spirit of the constitutional freedom of choice of women in this nation and making freedom of choice essentially a luxury for those who are not economically disadvantaged.

UNITED LABOR ACTION• is a national network of unionists, labor activists and unemployed workers, whose members, including many women, are of all nationalities who organize for workers' rights, with special concern for the poorest and unorganized. It supports the right of working women to have their right to privacy in making personal decisions about their lives as one aspect of having an equal place at the work place and in society. It views that working women must be guaranteed choice in reproductive matters with safe, legal, affordable abortions, Medicaid funding, if needed, and decent jobs, pay

equity, child care, parental leave and low cost health care in order to decide whether or when to have children. Poor and working women have always had abortions; many died as a result prior to 1973. To deny this right would hurt millions of working women, especially the poorest—service workers, part-time and temporary workers, and minimum-wage earners, of which sixty percent are women. It would fall most heavily upon and discriminate against Black, Latina, Asian and Native American women who form a disproportionately high number of the poorest workers and would again be forced to resort to unsafe abortions.

UNITED METHODIST CHURCH, GENERAL BOARD OF GLOBAL MINISTRIES, WOMEN'S DIVISION, a program agency of The United Methodist Church, which has 9.5 million members, has a strong commitment to women and to the right of women to make decisions such as abortion decisions. The Church's position affirms the Supreme Court decision in *Roe* v. *Wade*, believing that abortion should be a safe and legal procedure, and that a decision about abortion should be made by a woman after prayerful consideration with the assistance of persons she may choose. We believe that abortion should not be used for birth control nor gender selection, but recognize "tragic conflicts of life with life that may justify abortion, and in such cases support the legal option of abortion under proper medical procedures."

UNITED STATES STUDENT ASSOCIATION (USSA)* is a nationwide nonprofit membership organization which represents approximately two million students at approximately 200 colleges and universities throughout the United States. USSA has a strong commitment to ensuring access to higher education and the right to self-determination for all individuals regardless of age, gender, economic status, race, disability, sexual/affectional orientation, or veteran status.

UNITED SYNAGOGUE OF AMERICA (USA), founded in 1913, is the association of Conservative Congregations in North America, today consisting of 850 affiliated synagogues and over 1.5 million members. The USA affirms once again its posi-

tion that "abortions involve very serious psychological, religious, and moral problems, but the welfare of the mother must always be our primary concern."

UNIVERSITY OF CONNECTICUT WOMEN'S CENTER is committed to creating a social, economic, and political world that supports the full equity for women. Without unrestricted access to abortion for women of all ages, equity cannot be achieved. Continued attacks aimed at limiting women's access to reproductive freedoms are directly contrary to establishing a system whereby women are afforded equal protection under the law.

VOTERS FOR CHOICE is a national, independent, pro-choice political action committee. The mission of Voters for Choice is to preserve safe and legal abortion for all women by helping elect pro-choice candidates to United States Congress.

WASHINGTON WOMEN UNITED (WWU) founded in 1978, is a private nonprofit organization whose purpose is to lobby the Washington state legislature on issues of concern to women. Reproductive choice is WWU's first legislative priority. The organization has opposed state legislation that would limit a woman's reproductive choice. WWU is also active in a state coalition that has worked to maintain Medicaid funds for abortion.

WIDER OPPORTUNITIES FOR WOMEN supports the *amicus* brief because of our twenty-five year history working for equality of opportunity and economic self-sufficiency for women and girls. We urge the Court to uphold women's right to choose abortion.

WOMEN AND LAW IN SOUTHERN AFRICA is a regional organization doing research into women's legal rights in Southern Africa. As such, abortion laws are a major concern for us. Our interest in the cases is that our courts sometimes refer to United States judgments when deciding local cases.

WOMEN EMPLOYED is a national organization of working women, based in Chicago, with a membership of 1500. Over the past sixteen years, the organization has assisted thousands of

working women with problems of sex discrimination. Women Employed works to empower women to improve their economic status and to remove barriers to economic equality through advocacy, direct service, and public education. Women Employed strongly believes that any limitation on women's reproductive rights will have a profoundly negative impact on women's opportunities to achieve economic equity.

WOMEN IN CRISIS COMMITTEE OF THE EPISCOPAL DIOCESE OF MASSACHUSETTS objects strongly to any governmental attempts to interfere in the exercise of individual religious conscience with regard to procreative choice. Because we recognize the many divergent theological answers to the questions raised by abortion, we agree that each woman should be free to consult with her religious convictions, as well as her best medical advice, without governmental coercion or constraint when exercising religious and personal conscience in making a decision whether to terminate her pregnancy. We further consider restrictions on access to medical care based on ability to pay inequitable.

WOMEN LAWYERS ASSOCIATION OF LOS ANGELES (WLALA),* founded in 1919, is the largest local bar association in the State of California emphasizing the concerns of women. WLALA has as members over 1200 female and male lawyers, judges, and law students who are personally and professionally concerned with the importance of preserving a woman's right to choose for herself whether to terminate a pregnancy.

WOMEN LAWYERS ASSOCIATION OF MICHIGAN is an 1100 member professional association, founded in 1919 for the purposes of securing the rights of women in society, advancing the interests of women lawyers, improving the administration of justice, and promoting equality and social justice for all people. It adopted a pro-choice policy many years ago, believing it fundamental that constitutional privacy rights protect individuals from governmental intrusion into reproductive decision-making.

THE WOMEN OF COLOR PARTNERSHIP PROGRAM OF THE RELIGIOUS COALITION FOR ABORTION RIGHTS, located in Washington, D.C., is a national effort to educate women of color concerning public policies surrounding the issue of reproductive choice and its disproportionate affect on women of color. This program seeks to identify and address not only reproductive rights issues but also reproductive health care concerns from the unique perspective of women of color to include: (1) the right to choose or not to choose abortion; (2) family planning and all methods of birth control; (3) teen pregnancy; (4) prenatal care; (5) child care; and (6) medical abuses against women of color. We are concerned about the numerous public policies which create a negative impact on the ability of women of color to make a difficult decision, the unnecessary sacrifices that she and her family may have to make because of a lack of resources and the degradation that she must undergo to carry out her decision. We believe that *all* women, regardless of race or class, should have access to a safe and legal abortion.

WOMEN USA is an organization that seeks to encourage more widespread understanding and awareness of current social, economic, legal, political, cultural, educational, and other issues affecting the condition and status of women in the United States.

WOMEN'S ACTION ALLIANCE, INC.,* in New York City, works extensively with community based organizations serving women of color, young women, and low-income women. We are keenly aware of the importance of maintaining a full range of reproductive options for these and all women. If abortion services or access to abortion were to be restricted, these women would have no alternative but to seek dangerous alternatives to safe and legal abortion.

WOMEN'S ALLIANCE THEOLOGY, ETHICS AND RITUAL (WATER) is a nonprofit educational center that empowers women and men to be religious agents. The co-founders/co-directors work with an interfaith team of ministers, activists and professors to bring about change and move toward inclusivity in church and society. Through programs,

projects and publications, WATER provides women and men with resources to foster equality and create a "discipleship of equals." WATER signs the *amicus* brief because the organization is committed to equality and choice for all women, especially for poor women. The many religious questions raised by the case are precisely the kinds of issues that WATER considers central to understanding and guaranteeing religious agency. WATER constituents come from a variety of backgrounds and sets of beliefs on reproductive rights. But the values of free discussion, legal options and religious pluralism are prized among us. We urge this for society as a whole.

WOMEN'S AMERICAN ORT has long held a pro-choice position on the issue of reproductive freedom, and believes that any erosion of rights will be corrosive to fundamental individual liberties. ORT and its 145,000 members believe that when and whether to bear a child is a woman's private decision and opposes attempts to narrow the opportunity for women to control their own lives and be free from all levels of governmental intervention.

WOMEN'S BAR ASSOCIATION OF ILLINOIS (WBAI)* was founded in 1914 for the purpose of promoting and fostering the interests and welfare of women and women attorneys and to maintain the honor and dignity of the legal profession. WBAI's 1000 members have long campaigned for individual rights and liberties, including the right of women to make reproductive decisions free from governmental interference. WBAI has filed briefs *amicus curiae* before this Court on behalf of parties whose rights were in jeopardy.

WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS (WBA)* is a statewide bar association of over 1000 members. The WBA is committed to the advancement of women attorneys and to the protection of all women in the legal system. Since its founding in 1978, the WBA has been particularly concerned with the protection of a woman's right to choice. It has filed *amicus* briefs in cases concerning public funding of abortion, restrictions on family planning agencies, and the rights of minors to abortion. The WBA also sponsors a panel of attorneys who represent minors seeking judicial consent for abortion and is a member of the Massachusetts Coalition for Choice.

WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA (WBADC) is a membership organization of 1900 male and female attorneys who practice law in the District of Columbia. The WBADC has a continuing concern that safe choices should be available to all women about whether, and under what circumstances, to have children. The restrictions at issue in the referenced matters threaten the availability of those safe choices.

WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK (WBASNY) (which includes: the women's bar associations of Bronx County, Brooklyn, Capital District, Central New York, Mid-Hudson, Nassau, Orange/Sullivan, Queens, Greater Rochester, Rockland, Staten Island, Westchester, and Western New York) is an organization of over 3000 attorneys throughout the state. Founded in 1980, its stated purposes include the following: to cooperate with, aid and support organizations and causes which advance the status and progress of women in the society; to facilitate the administration of justice; and to cultivate the science of jurisprudence. The members of WBASNY support the principles enunciated in *Roe* v. *Wade*, including the recognition of a constitutionally guaranteed right to privacy.

WOMEN'S BUSINESS DEVELOPMENT CENTER subscribes to the general statement of interest of *amici*, *supra*, at p. 2.

WOMEN'S CITY CLUB OF NEW YORK, founded in 1916, is a membership organization concerned with contemporary societal programs—with the welfare of men, women, and children, in promoting such welfare by advocacy of an efficient government and a just legal system. We are concerned with these cases for the following reasons: we feel that the principle established in *Roe* v. *Wade* was a step forward in establishing the freedom of women for domain over their own bodies and that any step backward is a challenge to that freedom and the equality of women in our society.

WOMEN'S ELECTORAL LOBBY AUSTRALIA (WELA), formed in 1972, is a voluntary organization of women committed to the goal of achieving economic, educational and sexual equality for women. WELA is committed to promoting the status of women and regards the right to fertility control, including safe abortion, as fundamental to women's ability to live healthy and meaningful lives.

WOMEN'S EQUAL RIGHTS LEGAL DEFENSE AND EDUCATION FUND (WERLDEF) is a nonprofit California corporation. Established in 1978, WERLDEF was organized to ensure that women will be treated equally under the law. We achieve our goals by educating women about their legal rights, and assisting them in vindicating those rights by providing access to the courts. WERLDEF often receives calls from women who are pregnant and in crisis because they are neither financially nor emotionally able to raise a child and who are psychologically unable to carry their pregnancy to term and put their baby up for adoption.

WOMEN'S EQUITY ACTION LEAGUE (WEAL) was founded in 1968 as a national, nonprofit membership organization sponsoring research, education, litigation, and advocacy in order to advance the economic status of women. WEAL supports and recognizes a woman's constitutional right to reproductive choice. Basic to a woman's economic empowerment is the right to make a fully informed decision regarding the planning of her family.

WOMEN'S LAW CENTER, is an advocacy organization in the State of Maryland whose goal is to promote the legal rights of women through litigation, legislation and education. Our organization sees the privacy and reproductive rights issues raised in the *Akron* and *Ragsdale* cases as critical to the advancement of women's rights, and, indeed, as critical to preventing the loss of legal rights gained over the last sixteen years since the *Roe* v. *Wade* decision.

WOMEN'S LAW PROJECT (WLP)* is a nonprofit law firm dedicated to advancing the status and opportunities of women. WLP believes that the right to reproductive choice is an essential component of women's ability to play an equal role with men in this society, and has engaged in extensive litigation and public education designed to protect women's legal right to abortion.

WOMEN'S LEAGUE OF CONSERVATIVE JUDAISM,* founded in 1918, is an international organization of Jewish women which is associated with the Jewish Theological Seminary and works closely with the United Synagogue of America and the World Council of Synagogues. It is dedicated to the perpetuation of traditional Judaism in our modern society and the translation of its high ideals into practice through living Judaism in the home, the Synagogue and the community. Because reverence for life is the cornerstone of the Jewish heritage, it believes that abortion should be 'legally available, but ethically restricted.'

THE WOMEN'S LEGAL DEFENSE FUND (WLDF) is a nonprofit national advocacy organization of over 2500 members dedicated to challenging sex discrimination and to advancing women's concerns through the legal system. WLDF believes that reproductive freedom is fundamental to women's achievement of equality in society. Therefore WLDF makes this issue one of its highest priorities and has a long history of activism and legislative and judicial advocacy in this area.

WOMEN'S ORDINATION CONFERENCE, subscribes to the general statement of interest of *amici*, *supra*, at p. 2.

WOMEN'S RIGHTS COALITION is an active legislative effort composed of more than sixty local and statewide organizations across the State of Oregon. Founded in 1973, the Coalition brings together a wide range of service, professional, and advocacy groups who have the common belief that Oregon women should have equal rights and reproductive freedom.

WORKERS WORLD PARTY* is a national multi-chapter organization based in New York City whose members include working and poor women, youth, lesbians, seniors, disabled, unemployed and women on fixed incomes. It believes that every woman must be guaranteed choice and privacy regarding the

critical and very personal issue of whether or when to have children and the right to control their own reproduction. To deny this fundamental right to make the most personal decisions about their lives reinforces their subordinate status in society. Additionally it further burdens young, poor, Black, Latina, Asian and Native American women, who would have even fewer choices if legal abortion is overturned, and who, furthermore, would face a disproportionately higher number of complications by having to resort to unsafe abortionists or self-induced procedures.

WORLDWATCH INSTITUTE is an independent, nonprofit research organization established to alert decision-makers and the general public to emerging global trends in the availability and management of both human and natural resources. Population and family planning issues have been a central concern at Worldwatch since its founding in 1974.

YALE JOURNAL OF LAW AND FEMINISM is a nationally circulated journal dedicated to addressing feminist issues in law and legal scholarship. Preservation of the legal right to abortion is central to our concerns because a woman's control over her body is a necessary starting point for our broader concerns about the status of women in society.

YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE U.S.A. (YWCA) is a national membership movement, headquartered in New York City, that serves two million women and their families. The YWCA draws together women and girls of diverse experiences so that their lives may be open to new and deeper relationships and that together they may join in the struggle for peace and justice, freedom and dignity for all people. The YWCA is dedicated to the empowerment of women and the elimination of racism.

APPENDIX B

AD HOC COMMITTEE OF AMERICAN HISTORY PROFESSORS

Nina S. Adams, Sangamon State University
Jean-Christophe Agnew, Yale University
Gabriel A. Almond, Stanford University
Kenneth L. Ames, Winterthur Museum
Susan Dwyer Amussen, Connecticut College
Bonnie S. Anderson, Brooklyn College
M. Christine Anderson, University of Cincinnati
Lee Anderson, University of Iowa
Toby A. Appel, University of Maryland-Baltimore
Rima D. Apple, University of Wisconsin
Jo Ann E. Argersinger, University of Maryland-Baltimore
Peter H. Argersinger, University of Maryland-Baltimore
Susan Armitage, Washington State University
Cindy S. Aron, University of Virginia
Barri Y. Babow, University of Wisconsin
Alison Baker, New York University
Lois W. Banner, University of Southern California
Martha Banta, University of California at Los Angeles
G. J. Barker-Benfield, State University of New York, Albany
Elizabeth Lynne Beavers, University of Wisconsin
Susan Behuniak-Long, Le Moyne College
Rudolph M. Bell, Rutgers University
Thomas Bender, New York University
Judith M. Bennett, University of North Carolina
Daniel R. Benson, Johns Hopkins University
Frederick M. Binder, City University of New York, Staten Island
Anne-Emanuelle Birn, Johns Hopkins University
Rebecca Boehling, University of Maryland-Baltimore
Janet Carlisle Bogdan, Le Moyne College
Eileen Boris, Howard University
Jeanne Boydston, University of Wisconsin
Allan M. Brandt, Harvard University

Renate Bridenthal, City University of New York, Brooklyn
Gregory M. Britton, University of Wisconsin
Elizabeth A. R. Brown, City University of New York, Brooklyn
JaNae Brown, University of Wisconsin
Judith C. Brown, Stanford University
Joan Jacobs Brumberg, Cornell University
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E. Jane Burns, University of North Carolina
Edwin G. Burrows, Brooklyn College
Caroline Walker Bynum, Columbia University
Pat Calchina, University of Wisconsin
Susan E. Cayleff, San Diego State University
Jane Turner Censer, George Mason University
Jack R. Censer, George Mason University
Clarke A. Chambers, University of Minnesota
Herrick Chapman, Carnegie Mellon University
Ellen Chesler, Barnard College
Patrick M. Chiasson, Johns Hopkins University
Eric H. Christianson, University of Kentucky
Jill N. Claster, New York University
Paul G. E. Clemens, Rutgers University
Miriam J. Cohen, Vassar College
Paul A. Cohen, Wellesley College
Maureen S. Conklin, University of Wisconsin
Harold J. Cook, University of Wisconsin
Frederich Cooper, University of Michigan
Sarah E. Cooper, City University of New York, Staten Island
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Nancy F. Cott, Yale University
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Daniel Czitrom, Mount Holyoke College
Christine M. Dacier, Historical Society of Pennsylvania
Norman Daniels, Tufts University
Pete Daniel, National Museum of American History

Margaret H. Darrow, Dartmouth College
David Brion Davis, Yale University
Mollie C. Davis, Queens College
Natalie Zemon Davis, Princeton University
Philip Dawson, City University of New York, Brooklyn
Hannah S. Decker, University of Houston
Jane S. DeHart, University of North Carolina
Roberta E. Dell, Historical Society of Pennsylvania
Marion F. Deshmukh, George Mason University
Jane B. Donegan, Onondaga Community College
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Brian R. Duchin, Williams College
Arthur P. Dudden, Bryn Mawr College
Colleen Dunlavy, University of Wisconsin
Barbara Engel, University of Colorado
Lewis A. Erenberg, Loyola University
Sara M. Evans, University of Minnesota
John M. Eyler, University of Minnesota
Leslie Falk, Meharry Medical College
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Bruce R. Fehn, University of Wisconsin
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Faye Marie Getz, University of Wisconsin
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Faye Ginsburg, New York University
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Janet Golden, Temple University

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David Hollinger, University of Michigan
Emily Honig, Yale University
Helen Horowitz, Smith College
Joel D. Howell, University of Michigan
Martha C. Howell, Columbia University
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Nathan I. Huggins, Harvard University
Lynn Hunt, University of Pennsylvania
Harold M. Hyman, Rice University
Joseph E. Illick, San Francisco State University
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Maurice Isserman, Williams College
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Jack Temple Kirby, Miami University
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Dominick LaCabra, Cornell University
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Suzanne Lebsock, Rutgers University
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Karin Rosenblatt, University of Wisconsin
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Roy Rosenzweig, George Mason University
David Rosner, City University of New York
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Ellen Ross, Ramapo College
Guenther Roth, Columbia University
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Dennis Sherman, John Jay College of Criminal Justice
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Margaret Schabas, University of Wisconsin
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Jill D. Snider, University of North Carolina
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Jean Soderlund, University of Maryland-Baltimore
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Alan B. Spitzer, University of Iowa
Leo Spitzer, Dartmouth College
Christine Stansell, Princeton University
Ann B. Stevens, University of Wyoming
Nancy Leys Stepan, Columbia University
David L. Sterling, University of Cincinnati
Steve Stern, University of Wisconsin
Rosemary Stevens, University of Pennsylvania
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Phyllis Stock-Morton, Seton Hall University
Albert E. Stone, University of Iowa
Steven M. Stone, Indiana University
Susan Strasser, Historian
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Amy Swerdlow, Sarah Lawrence College
Nancy J. Taylor, University of Wisconsin
Barbara L. Tischler, Queens College
Kathryn M. Tomasek, University of Wisconsin
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Steven Topik, University of California at Irvine
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Morris J. Vogel, Temple University
Mark Von Hagen, Columbia University
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Judith R. Walkowitz, Johns Hopkins University
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Margaret Washington, Cornell University
Bari J. Watkins, Queens College
Harry L. Watson, University of North Carolina
Sydney Stahl Weinberg, Ramapo College of New Jersey
Lynn Weiner, Roosevelt University
John Hubbel Weiss, Cornell University
Patricia West, State University of New York, Binghamton
Jon Wiener, University of California at Irvine
E. Zabe Williams, University of Wisconsin
William Appleman Williams, Oregon State University
Lisa Wilson, Connecticut College
Tracy Wilson, University of North Carolina
Allan M. Winkler, Miami University of Ohio
Marianne Wokeck, Historical Society of Pennsylvania
Joel Wolfe, Williams College
John Womack, Jr., Harvard University
James Wright, Dartmouth College
Richard Yarborough, University of California at Los Angeles
Susan M. Yohn, Hofstra University
Reginald E. Zelnik, University of California at Berkeley
Judith P. Zinsser, United Nations International School
Michael Zuckerman, University of Pennsylvania

APPENDIX C

AD HOC COMMITTEE OF AMERICAN LAW PROFESSORS

Kathryn Abrams, Boston University School of Law
Harold I. Abramson, Fuchsberg Law Center
Cynthia Matson Adams, Indiana University School of Law
Edward A. Adelberg, Yale University
Lee A. Albert, State University of New York, Buffalo School of Law
T. Alexander Aleinikoff, University of Michigan Law School
Alice Alexander, Northeastern University School of Law
Gregory S. Alexander, Cornell Law School
Susan Grossman Alexander, Northwestern University School of Law
William P. Alford, University of California at Los Angeles, School of Law
Scott Altman, University of Southern California Law Center
William L. Andreen, University of Alabama School of Law
George J. Annas, Boston University
Fran Ansley, University of Tennessee College of Law
John S. Applegate, University of Cincinnati College of Law
Robert H. Aronson, University of Washington School of Law
Donna E. Arzt, Syracuse University College of Law
Marie Ashe, West Virginia University College of Law
Frank Askin, Rutgers State University, S.I. Newhouse Center for Law & Justice
James B. Atleson, State University of New York, Buffalo School of Law
Barbara Atwood, University of Arizona College of Law
Brook K. Baker, Northeastern University School of Law
Joan E. Baker, Cleveland State University, Cleveland-Marshall College of Law
Margaret A. Baldwin, Florida State University College of Law
Mary Banach, Columbia University School of Law
Susan A. Bandes, De Paul University College of Law

Jayne W. Barnard, College of William and Mary, Marshall-Wythe School of Law
Elizabeth Bartholet, Harvard Law School
Katherine T. Bartlett, Duke University School of Law
Robert M. Bastress, West Virginia University College of Law
Jon Bauer, University of Connecticut School of Law
Loftus E. Becker, Jr., University of Connecticut School of Law
Mary E. Becker, University of Chicago Law School
Vicki Been, Rutgers State University, S.I. Newhouse Center for Law & Justice
Michal R. Belknap, California Western School of Law
Peter A. Bell, Syracuse University College of Law
Edmund O. Belsheim, Lewis and Clark College, Northwestern School of Law
Terence H. Benbow, University of Bridgeport School of Law
Leslie Bender, Syracuse University College of Law
Vivian Berger, Columbia University School of Law
Herbert N. Bernhardt, University of Baltimore School of Law
Barbara Black, Pace University School of Law
Catherine E. Blackburn, University of Louisville School of Law
Chris Blair, The University of Tulsa College of Law
Robert F. Blomquist, Valparaiso University School of Law
Grace Ganz Blumberg, University of California at Los Angeles, School of Law
Robert A. Bohrer, California Western School of Law
James B. Boskey, Seton Hall Law School
Janet Bowermaster, California Western School of Law
Catherine Grant Bowman, Northwestern University School of Law
Francis A. Boyce, University of Illinois College of Law
Carolyn S. Bratt, University of Kentucky College of Law
Jean Braucher, University of Cincinnati College of Law
Mary D. Bridgen, University of Wyoming College of Law
Paul H. Brietzke, Valparaiso University Law School
John C. Brittain, University of Connecticut School of Law
Katherine S. Broderick, University of the District of Columbia School of Law
Mark S. Brodin, Boston College Law School
Alexander D. Brooks, Rutgers State University Law School

Jennifer Brooks, William Mitchell College of Law
Michael B. Browde, University of New Mexico School of Law
Judith Olans Brown, Northeastern University School of Law
Karen B. Brown, Brooklyn Law School
Ralph S. Brown, Yale Law School
Alan E. Brownstein, University of California at Davis, School of Law
Carol S. Bruch, University of California at Davis, School of Law
Patricia L. Bryon, University of North Carolina School of Law
Thomas D. Buckley, Cleveland State University College of Law
William T. Burke, University of Washington School of Law
Ann M. Burkhart, University of Minnesota Law School
John M. Burkhoff, University of Pittsburgh School of Law
Michael M. Burns, Nova University Law Center
Claudia Burton, Willamette University College of Law
Carole Butler, Capital University Law School
Edwin J. Butterfoss, Hamline University School of Law
Patricia A. Cain, University of Texas School of Law
Paulette M. Caldwell, New York University School of Law
Jay E. Carlisle, Pace University School of Law
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Leah F. Chanin, Mercer University Law School
Erwin Chemerinsky, University of Southern California Law Center
Paul Chill, University of Connecticut School of Law
Carol Chomosky, University of Minnesota Law School
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Richard H. Chused, Georgetown University Law Center
Natalie Loder Clark, Northern Illinois University College of Law
Roger S. Clark, Rutgers State University Law School
Robert N. Clinton, University of Iowa College of Law
James R. Coben, Hamline University School of Law
Mary I. Coombs, University of Miami School of Law
Jan C. Costello, Loyola Law School
Marion Crain, West Virginia University College of Law

Joseph Crea, Brooklyn Law School
Earl M. Curry, Jr., Cleveland State University, Cleveland-Marshall College of Law
Karen Czapanskiy, University of Maryland Law School
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Wes Daniels, University of Miami School of Law
Deryl D. Dantzler, Mercer University Law School
Nancy Dart, University of Connecticut School of Law
Kenneth Dau-Schmidt, University of Cincinnati College of Law
John H. Davidson, University of South Dakota School of Law
Martha S. Davis, University of South Dakota School of Law
Cathryn V. Deal, Hamline University School of Law
Walter E. Dellinger III, Duke University School of Law
Robert J. Desiderio, University of New Mexico Law School
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Martha Bakos Dietz, Brooklyn Law School
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Norman Dorsen, New York University School of Law
James Douglas, Texas Southern University, Thurgood Marshall School of Law
Mary L. Dudziak, University of Iowa College of Law
Alice K. Dueker, New York University School of Law
Mary C. Dunlap, Stanford Law School and Golden Gate University Law School
William V. Dunlap, University of Bridgeport School of Law
Donald J. Dunn, Western New England School of Law
Melvyn R. Durchslag, Case Western Reserve University Law School
Christopher F. Edley, Jr., Harvard Law School
John D. Egnal, Western New England School of Law
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Charles L. Field, Northeastern University School of Law
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Harry First, New York University Law School
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David Kennedy, Harvard Law School
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APPENDIX D

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Stephen Adler, Institute for Advanced Study, Princeton University
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E.H. Ahrens, Professor, Rockefeller University
Bruce Alberts, Chair, Department of Biochemistry, University of California at San Francisco School of Medicine
Gabriel A. Almond, Professor of Political Science, Stanford University
Dennis Amos, Duke University School of Medicine
Edward Anders, Professor of Chemistry, University of Chicago
Philip Anderson, Professor of Physics, Princeton University **(Nobel Prize)**
Theodore W. Anderson, Professor Emeritus of Economics and Statistics, Stanford University
Clay Armstrong, Professor of Physiology, University of Pennsylvania
Robert Austrian, Chairman Emeritus, Department of Research Medicine, University of Pennsylvania
George Backus, Professor of Geophysics, University of California at San Diego
John Backus, I.B.M. Fellow
David Baltimore, Director and Professor of Biology, Physiology, Whitehead Institute for Biomedical Research **(Nobel Prize, 1975)**
Allen Bard, Chair Department of Chemistry, University of Texas
Rabbi Terry R. Bard, Coordinator, Medical Ethics Program, Beth Israel Hospital, Massachusetts
Gail Amalia Barth-Katz, Director of Planning, Union Memorial Hospital, Baltimore, Maryland

Hyman Bass, Professor of Mathematics, Columbia University
Peter Bayhise, Director, Fertility Control Clinic, Brisbane, Australia
Jessie Beauchamp, Professor of Chemistry, California Institute of Technology
Jonathan Beckwith, Professor, Harvard University
Paul Beeson, Professor Emeritus of Medicine, University of Washington
Helmut Beinert, Professor of Biochemistry, Medical College of Wisconsin
Jeffrey Bell, Institute of Molecuar Biology, University of Oregon
Michael Bennet, Chair, Department of Neuroscience, Albert Einstein School of Medicine
Paul Berg, Director, Beckman Center, Stanford University Medical Center **(Nobel Prize)**
Robert W. Berliner, Professor Emeritus of Physiology and Medicine, Yale University
Robert Berne, Professor, University of Virginia
Richard Bersohn, Professor of Natural Science, Columbia University
Hans Bethe, Professor Emeritus, Cornell University **(Nobel Prize)**
Ernest Beutler, Chair, Department of Molecular and Experimental Medicine, Scripps Clinic and Research Foundation
Peter Bickel, Professor, University of California at Berkeley
Jacob Bigeleisen, Professor Emeritus, State University of New York
Emilio Bizzi, Chair, Department of Brain and Cognitive Sciences, Massachusetts Institute of Technology
Peter Blau, Professor, University of North Carolina
Gunter Blobel, Professor of Cell Biology, Rockefeller University
Herman Bloch, Consultant—Chemistry
Nicolaas Bloemberger, Professor, Harvard University **(Nobel Prize, 1981)**
Lawrence Bogorad, Professor of Biology, Harvard University

Kenneth E. Boulding, Professor Emeritus of Economics, University of Colorado
Edward Boyse, Professor of Microbiology, University of Arizona
Roscoe Brady, Branch Chief, National Institutes of Health
Myron Brakke, Professor Emeritus, University of Nebraska
Roy J. Britten, Carnegie Senior Research Associate, California Institute of Technology
Donald Brown, Director, Department of Embryology, Carnegie Institute of Washington
Roger Brown, Professor of Psychology, Harvard University
John Buchanan, Professor Emeritus of Biochemistry, Massachusetts Institute of Technology
Theodore Bullock, Professor of Neuroscience, University of California at San Diego
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Hampton Carson, Professor Emeritus of Genetics, University of Hawaii
Herbert Carter, Professor Emeritus of Chemistry, University of Arizona
Kenneth Case, Professor Emeritus, Rockefeller University
William Castle, Professor of Medicine
Michael J. Chamberlin, Professor of Biochemistry and Molecular Biology, University of California at Berkeley
Vicki Chandler, Assistant Professor of Molecular Biology, University of Oregon
S. Chandrasekhar, M.D. **(Nobel Prize)**
Herman Chernoff, Professor of Statistics, Harvard University
George Clark, Professor of Physics, Massachusetts Institute of Technology
Janice Clark, Institute of Molecular Biology, University of Oregon
John Clements, Professor of Biology, University of California at San Francisco
Michael D. Coe, Professor of Anthropology, Yale University
Marshall Cohen, Professor, California Institute of Technology

Mildred Cohen, Professor Emeritus of Physiological Chemistry, University of Pennsylvania
Morris Cohen, Professor Emeritus, Massachusetts Institute of Technology
Seymore Cohen, Professor Emeritus, American Cancer Society
Stanley Cohen, Professor of Biochemistry, Vanderbilt University **(Nobel Prize)**
Stanley N. Cohen, Professor of Genetics, Stanford University School of Medicine
Sidney Coleman, Professor of Physics, Harvard University
Leon Cooper, Professor of Science, Brown University **(Nobel Prize, 1972)**
Ernest Courant, Senior Physicist, Brookhaven National Laboratory
Ronald Cranford, M.D., Hennepin County Medical Center
Stanley J. Cristol, Distinguished Professor of Chemistry, University of Colorado
James Cronin, Professor of Physics, University of Chicago **(Nobel Prize, 1980)**
James Crow, Professor Emeritus of Genetics, University of Wisconsin
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James Darnell, Professor, Rockefeller University
William Daughaday, Professor, Washington University School of Medicine
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Norman Davidson, Professor Emeritus of Chemical Biology, California Institute of Technology
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Anne Davis, Professor, University of California at San Francisco School of Nursing

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Herman Eisen, Professor Emeritus of Biology, Massachusetts Institute of Technology
Judith Eisen, Assistant Professor of Biology, University of Oregon
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Samuel Eilenberg, Professor Emeritus, Columbia University

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Harold Evans, Professor of Physiology, Oregon State University
Stanley Falkow, Professor of Microbiology, Stanford University
Ugo Fano, Professor Emeritus of Physics, James Frank Institute
Walter Feit, Professor of Mathematics, Yale University
Russel Fernald, Professor of Biology, University of Oregon
Herman Feshbach, Professor Emeritus, Massachusetts Institute of Technology
Gerald Fink, Professor of Genetics, Massachusetts Institute of Technology
Gerald Fischbach, Professor of Anatomy, Washington University
Janet Fleetwood, Director, Medical Humanities Program, Medical College of Pennsylvania
Robert Fletterick, Professor of Biochemistry, University of California at San Francisco
Judith Flippen-Anderson, Naval Research Lab
Henriette Foss, Institute of Molecular Biology, University of Oregon
William Fowler, Professor of Physics Emeritus, California Institute of Technology **(Nobel Prize)**
Robert T. Francoeur, Professor of Biological and Allied Health Sciences, Fairleigh Dickinson University
Ronald Freedman, Professor of Sociology Emeritus, University of Michigan
Irwin Fridovich, Professor of Biochemistry, Duke University
Josef Fried, Professor of Biochemistry, University of Chicago
Gerhart Friedlander, Professor Emeritus of Chemistry
Edwin Furshpan, Professor of Neurobiology, Harvard Medical School

Alan Garen, Professor of Microbiology, Yale University
Wendell R. Garner, Professor Emeritus of Psychology, Yale University
Marshall Gates, Professor Emeritus of Chemistry, University of Rochester
Willard Gaylin, M.D., President, The Hastings Center
Joseph Gall, Carnegie Institution of Washington
Alfred Gilman, Chair, Department of Pharmacology, University of Texas
Donald Glaser, Professor of Physics and Neurobiology, University of California at Berkeley **(Nobel Prize)**
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Zvi Grilches, Professor of Economics, Harvard University
David Gross, Professor of Physics, Princeton University
Jerome Gross, Biologist, Massachusetts General Hospital
Ernest Grunwald, Professor Emeritus of Chemistry
Roger Guillemin, Scientist, The Whittier Institute **(Nobel Prize, Medicine, 1977)**
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Robert Hauser, Professor, University of Wisconsin
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D.M. Hegsted, Professor Emeritus of Nutrition
Jake Heinenmann, National Institute of Health, Rocky Mountain Lab
Ernest Henley, Professor of Physics, University of Washington
Dudley Herschbach, Professor of Chemistry, Harvard University **(Nobel Prize)**
Ernest Hilgard, Professor Emeritus of Psychology, Stanford University
Robert Hill, Department of Biochemistry, Duke Medical Center
Bertile Hille, Professor of Physiology, University of Washington
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AMICUS CURIAE

BRIEF

(23)

No. 88-805

Supreme Court, U.S.
FILED
OCT 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,

Appellant,

—v.—

AKRON CENTER FOR REPRODUCTIVE HEALTH,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICI CURIAE* AMERICAN INDIAN HEALTH CARE ASSOCIATION ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND CHOICES WOMEN'S MEDICAL CENTER COMMITTEE OF INTERNS AND RESIDENTS DC RAPE CRISIS CENTER HISPANIC HEALTH COUNCIL NATIONAL CENTER FOR LESBIAN RIGHTS NATIONAL RAINBOW COALITION, WOMEN'S COMMISSION, ET AL., IN SUPPORT OF APPELLEES

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76pp

QUESTIONS PRESENTED

1. Whether a state statute requiring all unmarried, unemancipated pregnant minors to notify at least one parent prior to obtaining an abortion imposes an undue burden on a young woman's right to choose an abortion?

2. Whether a state statute requiring unmarried, unemancipated pregnant minors who choose not to notify a parent to seek a court order unduly burdens their right to choose an abortion?

3. Whether a state statute requiring all unmarried, unemancipated minors to notify a parent prior to obtaining an abortion, or, in the alternative seek a court order excusing them from doing so serves any legitimate state interest?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS . . . . . ii, iii

TABLE OF AUTHORITIES. iv

CONSENT OF THE PARTIES 1

INTEREST OF AMICI 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. REQUIRING ALL UNMARRIED, UNEMANCIPATED MINORS TO NOTIFY THEIR PARENTS OF THEIR DECISION TO SEEK AN ABORTION IMPOSES AN UNDUE BURDEN ON A MINOR'S RIGHT TO CHOOSE 4

A. Mandating Notice Where The Minor Is Or Might Be A Victim Of Abuse Is An Undue Burden On Her Constitutional Right To Choose As Well As Her Right To Protect Her Personal Security 8

B. Mandatory Notification Interferes With The Adolescent Woman's Development Toward Independence 12

II. FOR MANY YOUNG WOMEN THE PROCEDURES THEMSELVES WILL PRECLUDE ITSELF ACCESS, OR IF USED, WILL UNDULY BURDEN THEIR RIGHT TO ABORTION 15

A. Those Who Fear The Revelation Of Abuse Cannot Utilize The Bypass 16

B. The Complex Procedure And Intimidation Inherent In Going To Court To Obtain The Right To Abortion Will Preclude Its Use By Many Teen Women 17

C. The Bypass Provision Presents Special Burdens For Young Women From Rural Areas 20

D. The Burdens of the By-Pass Are Exacerbated By Poverty . 28

E. The By-Pass Procedure Creates Delay And, Therefore, Increases The Health Risks Associated With Abortion 30

III. REQUIRING PREGNANT TEENAGERS TO NOTIFY THEIR PARENTS OF THEIR DECISION TO OBTAIN AN ABORTION, OR IN THE ALTERNATIVE, OBTAIN A JUDICIAL ORDER EXCUSING THEM FROM DOING SO SERVES NO IMPORTANT, LET ALONE LEGITIMATE STATE INTERESTS 36

CONCLUSION 45

APPENDIX i

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Bellotti v. Baird,
443 U.S. 622 (1979).....5, 39

Committee for Public Education v. Nyquist,
413 U.S. 756 (1973) 7

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109 S. Ct. 3086 (1989).....6

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370 U.S. 421 (1962)..... 8

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CONSENT OF THE PARTIES

The parties have consented to the filing of this brief and their letters of consent are being filed with the Clerk of the Court.

INTEREST OF AMICI

The over twenty-five civil rights, women's, labor organizations joining in this brief as Amici Curiae represent various segments of American society with diverse interests. See Appendix. All Amici are concerned that adolescent women's right to choose not be destroyed or infringed by notification statutes such as that challenged herein.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth by the appellees herein.

SUMMARY OF ARGUMENT

While the state of Ohio warns that its mandatory parental notification law serves to protect young women against uninformed decisions and to enhance parental consultation, (Brief of

Appellant at p. 23), the fact is that both the notification requirment and the judicial bypass do nothing but impose tremendous burdens -- tantatmount for some young women to absolute parental veto of their abortion decisions.

The burdens of mandatory notification are severe and fall most heavily on adolescents who are at the greatest risk in the home. Far from the idealized version of parental support purveyed to justify this law, too many adolescent women live in homes where physical, mental and sexual abuse is the order of the day. For these young women, notification conditions the abortion choice on the risk of concrete harm or further family disintegration. Moreover, compulsory notification may compromise the two central tasks of adolescence - the development of gradual separation from the family of origin, and the development of the capacity for independent decision-making.

The judicial by-pass procedure provided by

Ohio law does not cure the defects in the statute. Many young women cannot utilize it either because they fear reporting of the abuse they have suffered, or because they are ignorant of or intimidated by the prospect of a judicial proceeding -- a proceeding which they fear and experience not as protective of their rights but as a formal shaming ceremony. For young women in rural areas, the by-pass is either inexcessible or excessively demanding, and poverty exacerbates the problems of access. In addition, the by-pass procedure results in significant delay, which is associated with increased risks to a young women's life and health. In sum, the notification/by-pass statute operates either as an "absolute" veto, or as a substantial and ofter irreparable burden on young women's constitutional freedom.

It is thus apparent that notification and the by-pass do not meet the test of heightened scrutiny applicable to this case. Not only do

they fail to serve the asserted purposes; they heap tremendous harm on young women who choose not to notify their parents. The state has other voluntary and salutory means to protect minors and enhance the mutuality in their relationship with parents. As such, the statute constitutes not only an impermissible condition on the fundamental right to abortion, but also a deprivation of liberty in a basic sense -- the imposition of avoidable harm to the most vulnerable party.

ARGUMENT

I. REQUIRING ALL UNMARRIED, UNEMANCIPATED MINORS TO NOTIFY THEIR PARENTS OF THEIR DECISION TO SEEK AN ABORTION IMPOSES AN UNDUE BURDEN ON A MINOR'S RIGHT TO CHOOSE

While Parents are principally responsible for the care and nurture of minors, this Court has repeatedly recognized that parental control over the lives of their children is not without limits. See e.g., Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 170 (1944).

In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976), which invalidated parental consent as an arbitrary "veto power" over the decisions of pregnant minors, the court recognized that:

> Constitutional rights do not mature and come into being magically only when one attains the state defined age of majority. Minors, as well as adults are protected by the Constitution and possess constitutional rights.

(citations omitted).

Moreover, in Baird v. Bellotti, 443 U.S. 622, 647 (1979), the court made clear that minors are constitutionally protected against parental involvement that might prevent or obstruct the exercise of their right to choose. The court emphasized the critical importance of a by-pass procedure that would not compromise the autonomy or anonymity of the mature minor. ed. at 651. See also, H.L. v. Matheson, 450 U.S. 398, 419-420 (1981), (Powell, J. concurring).

While mandatory notification statutes

impose almost no burden on those who are able to notify their parents of their decision to seek an abortion, their devastating impact is felt by the most vulnerable young women -- those who live in homes where they suffer or fear mental, physical, or sexual abuse. They also burden the rights and important developmental interests of young women in making decisions independently of their parents. While the state may surely encourage voluntary consultation in appropriate circumstances, to mandate it severely threatens the security and integrity of young women as well as the right to choose abortion.[1]

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[1] While it is beyond the scope of this brief, amici suggest that establishment and free exercise clause concerns also militate toward the invalidation of these abortion-specific notice statutes. If Justice Stevens is correct that the belief that life begins at conception is religious, Webster v. Reproductive Health Service, ___U.S.____, 109 S.Ct. 3040, 3082 (1989) (Stevens, J. concurring), then these statutes would seem to both reflect and accomplish state endorsement of religious beliefs. See, Lemon v. Kurtzman, 403 U.S. 602 (1971); Grand Rapids School District v. BAll, 473 U.S. 373 (1985); County of Alleghany v. American Civil Liberties Union, ____U.S.____, 109

S. Ct. 3086 (1989). The Court would need to examine whether the ostensible secular purposes are "sham," Wallace v. Jaffree, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring), in light of the fact that abortion is singled out for notice from other, at least, equally life-shaping reproductive choices based on a purpose to save "lives", and that parents who are religiously opposed to abortion are among its primary beneficiaries. It would also need to consider whether the state, through giving the parents confidential information (far more valuable here than financial assistance), has enhanced these parents' ability to indoctrinate, control, or punish their minor daughters who choose abortion, and, thereby, has crossed the critical line between respecting the parents' privacy right to inculcate religion in their children. See e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) and impermissibly endorsing or advancing their religious viewpoint. See e.g., Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Mueller v. Allen, 463 U.S. 388, and 404 (Marshall, J. dissenting) (1983). From the perspective of both parents and their minor daughters, the religious endorsement would be keenly felt. See, Grand Rapids, 473 U.S. at 390. This is particularly true since the religious conflict arises at the point when young women are, on the one hand, at the threshold of mature decision-making which involves the free exercise of their independent religious and conscientious convictions; and, on the other, vulnerable to parental demands or coercion because of their dependent status.

It might be argued that an anonymous and expeditious by-pass which recognized the independent decision-making capacity of the minor

A. Mandating Notice Where The Minor Is Or Might Be A Victim Of Abuse Is An Undue Burden On Her Constitutional Right To Choose As Well As Her Right To Protect Her Personal Security.

It is a tragedy of enormous dimension that for hundreds of thousands -- possibly a million -- children and adolescents the home is a place of terror and pain rather than security and comfort. Child abuse is quintessentially arbitrary and unpredictable. Adolescence is a particularly dangerous time that brings into conflict the parent's own confrontation with mid-life and the central developmental task of adolescence which is the separation from the family of origin and the capacity to achieve independence. Self-

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would be sufficient protection against the imposition of religion. But a by-pass would not cure the problem. As we will argue, many young women cannot avail themselves of it, and, for those who do, the desperation, humiliation and health burdens involved are as offensive to the first amendment as the embarassment and isolation suffered by the school child who must seek exemption from religious exercises. Engel v. Vitale, 370 U.S. 421 (1962).

assertion and emerging sexuality are major aspects of development which present major risks of abuse.[2] The discovery of pregnancy may be a triggering event.[3][4]

A young woman in an abusive home may be unable to confide in either parent or sibling, out of fear that she and/or they will be further assaulted.[5] And, communication between the non-abusive parent and the child may also be difficult, if not impossible in many of these

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[2] Anderson, "Issues of Adolescence," in U.S. Dept. of Health & Human Services, Adolescent Maltreatment: Issues and Program Models, 1 (USGPO 1984).

[3] For example, just as this brief was being completed counsel learned that a sixth grade girl was murdered by her father one day before she was scheduled to obtain an abortion. The father was also charged with having impregnated her. Eusunsa, "Adams Charged With Murder," Idaho Statesman, p. C1, col. 3 (August 23, 1989).

[5] Melton, Legal Regulation of Adolescent Abortion, 42 American Psychologist, 79, 81 (1987); Zacckin, The Discovery Rule and Father-Daughter Incest: A Legislative Response, 29 Boston College Law Review, 941, 946 (1988).

families.[6]

Further, it has been estimated that, 100,000[7] to 500,000[8] children, a disproportionate number of them young women, are victims of sexual abuse each year. One government sponsored survey found that girls were ten times more likely to than boys to be sexually assaulted and that one out of every ten American women had been sexually assaulted by a relative in her childhood[9]. Fathers, in the words of one author, are "the most common perpetrator of incestuous assault."[10]

In incestuous homes, secrecy is normally

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[6] Harrington, The Disposition of Father-Daughter Incestuous Assault Cases: An Overview, 21 New England Law Review, 399, 407 (1986). .

[7] National Center On Child Abuse and Neglect, Intra-Family Sexual Abuse of Children (1979).

[8] Sarajino, A Nationwide Estimate of the Incidence of Sexual Offenses Against Children, (VII. Child Welfare 127 (Feb. 1979).

[9] Meyers, Incest: No One Wants To Know, Student Lawyer, 29, 30 (November 1980).

[10] Harrington, supra note 10 at 407.

the rule.[11] This is because, as Judith Herman observed in, Father-Daughter Incest 88 (1981):

> Most [victims] were warned not to tell anyone about the sexual episodes. They were threatened with the most dreadful consequences if they told their mothers would have a nervous breakdown, their parents would divorce, their fathers would be put in jail, or they themselves would be punished and sent away from home. One way or another, the girls were given to understand that breaking secrecy would lead to separation from one or both of their parents ... In some cases, the fathers threatened severe bodily harm.

See also, Note, Incest: The Need to Develop A Response To Intra-Family Sexual Abuse, 22 Duquesne Law Review 901 (1984). While efforts to increase reporting and protective interventions against sexual and other abuse are extremely

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[11] Felker, supra note 13, at 906. Melton, Legal Regulation of Adolescent Abortion, 42 American Psychologist, 79, 81 (1987); Zacckin, The Discovery Rule and Father-Daughter Incest: A Legislative Response, 29 Boston College Law Review, 941, 946 (1988).

important they require great sensitivity to the situation of the child.[12] It is hard to imagine a more destructive approach than mandatory notification of the parent or parents by an abortion provider.

In sum, mandatory notice as a condition of obtaining an abortion not only threatens young women's ability to make and effectuate constitutional choices, it further threatens their liberty and security by opening them up to abuse, punishment and the further disintegration of their homes.

B. Mandatory Notification Interferes With The Adolescent Woman's Development Toward Independence

Most minors voluntarily inform at least one parent, and the older the teen, the less likely she will seek parental involvement.[13] Studies suggest that this is maybe a positive rather than negative sign and that compelled notification may negate any positive impact that an abortion can have on a teenager's growth and development.[14] One study indicates that obtaining an abortion increases a woman's sense of autonomy and efficacy.[15] Several studies have suggested that this outcome might be even more pronounced among adolescents because, despite the fact that many adolescent women assume considerable responsibilities, they have few

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[12] See e.g., M. Straus & Richard J. Gelles, Societal Changes and Change in Family Violence from 1975 to 1985 As Revealed By Two National Surveys, 48 J. of Marriage and the Family 465 (1986).

[13] Torres, Forrest & Eisman, Telling Parents: Clinic Policies and Adolescents' Use of Family Planning And Abortion Services, 12 Fam. Plan. Persp. 284, 291, 288 (1980).

[14] Blum, Resnick and Stark, The Impact Of A Parental Notification Law On Adolescent Abortion Decision-Making, 74 Am. J. of Public Health, 619, 620 (1987).

[15] G.B. Melton, Minors and Privacy, 62 Neb. L. Review. 455, 470 (1983).

experiences of autonomy and control in their daily lives. Control over one's own choices, whether real or only perceived, -- leads to psychological well-being, high self-esteem and behavioral responsibility. This beneficial result may well be lost if a teenager is forced to notify her parents against her own best judgment. Indeed, when control over decision-making is withdrawn, reactions can range from rebellion to depression, hypertension or regression.[16]

In short, Ohio's compelled notification requirement is at best counterproductive and at worst, and not infrequently, dangerous to many teenagers' emotional and physical well-being.

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[16] Baker, Thalberg and Morrison, Parents' Behavioral Norms as Predictors of Adolescent Sexual Activity and Contraceptivve Use, 23 Adolescence, 265 (1988); Demo, Small and Savin-Williams, Family Relations and the Self-Esteem of Adolescents and Their Parents, 49 Journal of Marriage and Family, 705 (1987); Muss, Carol Gilligan's Theory of Sex Differences In the Development of Moral Reasoning During Adolescence, 23 Adolescence, 229 (1988).

Accordingly, because a substantial number of American adolescents are unable or unwilling to inform their parents of their decision their parents of their decision to seek an abortion, this Court should respect their right to do so and hold Ohio the statute challenged herein violative of minor's right to choose.

II. FOR MANY YOUNG WOMEN THE BY-PASS PROCEDURES THEMSELVES WILL PRECLUDE ITSELF ACCESS, OR IF USED, WILL UNDULY BURDEN THEIR RIGHT TO ABORTION

The Ohio statute in question provides that a minor may file a complaint requesting the issuance of an order authorizing her to consent to an abortion without notification to her parents in a juvenile court of the county in which she lives, or in any county which borders the county in which she lives or the county in which the abortion will be performed[17] Despite the apparent freedom of access embodied in the

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[17] Ohio Rev. Code §2151.85 (1988 Supp.); Ohio Rev. Code §2505.073 (1988 Supp.)

statutory language, teens with abusive home lives as well as poor and/or rural pregnant teens will not be benefitted by the statute.

A. Those Who Fear The Revelation Of Abuse Cannot Utilize The Bypass

A judicial by-pass procedure cures none of the problems inherent in mandatory parental notification. Instead, it merely offers teenagers the Hobbesian choice of notifying their parents, with its attendant risk of physical and/or mental injury, or exposing their family problems to strangers. These choices may, in fact, appear illusory since the risks of revelation to others loom large and cannot be eliminated.

In addition to the defects in confidentiality identified by the district court, the structure of the Ohio bypass exacerbates the danger of revelation by requiring dismissal of a petition which alleges maturity as the only ground for bypass, if this ground should fail.

By requiring the filing of a second petition -- and thus further delay -- in order to raise a best interests claim, the statute appears to coerce unnecessary allegations of abuse. There is no legitimate reason for this atavistic return to a common-law system of pleading. Moreover, to the extent they fear that allegations of abuse will not be kept confidential, -- not only from parents as the statute provides, but also from social welfare and prosecutional authorities, -- teen women will be unable to utilize the bypass. In these most needy cases, the bypass is a meaningless remedy; mandatory notification is tantamount to an "absolute veto" of the abortion choice.

B. The Complex Procedure And Intimidation Inherent In Going To Court To Obtain The Right To Abortion Will Preclude Its Use By Many Teen Women.

Minors are characteristically unaware of the availability of by-pass procedures and

unsophisticated at mediating procedural requirements. Teenagers' lack of familiarity with and fear of the legal system further diminishes the usefulness of the judicial by-pass procedure. There is strong evidence that individuals exercise their legal rights to the extent they are familiar with them[18]. Studies have demonstrated that teenagers are generally "ignorant" of the law as it pertains to them[19]. This was particularly so when the teenagers were asked questions regarding their knowledge of their procedural rights and their rights to medical care[20]. This was true regardless of the teenagers' sex[21].

Teens who are not deterred by the

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[18] Saunders, Ignorance of the Law Among Teenagers: Is It A Barrier to the Exertion of Their Rights As Citizens, XVI Adolescence 711, (Fall 1981).

[19] Id.

[20] Id.

[21] Id.

knowledge of judicial proceedings from even seeking an abortion, often discover for the first time at the clinic that they have to schedule an appointment in court. Indeed, over half the participants in a Minnesota study reported having no awareness of the notice law or of the need to schedule a court appearance prior to making a clinic appointment for pregnancy termination[22].

In addition, teenagers are likely to identify going to court with trouble, and not with assertion of rights. They are likely to be intimidated by the analogy to criminal court or family court. For all these reasons, the imposition of a judicial bypass does not function as safety-value for mandatory notification. Rather it simply demonstrates that the notice requirement is equivalent to an absolute veto for those too ignorant or scared to utilize it.

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[22] Blum, Resnick and Stark, The Impact of Parental Notification Laws on Adolescent Abortion Decision-Making, supra, n. 14 at 620.

C. The Bypass Provision Presents Special Burdens For Young Women From Rural Areas

Minors from rural areas face potentially preclusive barriers created by the judicial by-pass procedures. The lack of abortion services available in rural areas, the difficulty in maintaining anonymity in small rural communities, bureaucratic inefficiency inherent in the by-pass procedure, and the problems typically attendant to poverty all serve to make utilization of the judicial by-pass procedure extremely difficult for the rural, poor and abused teens.

There are an increasing number of counties in the United States with no doctors, clinics or hospitals that perform abortions.[23] The resulting need to travel greater distances to obtain an abortion imposes substantial hardships and delay on all women seeking abortions. The

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[23] New York Times, Tuesday, July 11, 1989, col. 1.

young adolescent who needs to keep from her parents her decision to have an abortion faces even greater obstacles. If she is compelled to go to court first, the problem, then, is not only where to go, how to get there, how to pay for the trip and how to explain it, but also how to do all these things twice.

Making travel arrangements is particularly difficult for adolescents. Many are not yet licensed to drive. Even when it is feasible for them to utilize public transportation, they may have difficulty affording the cost. They must also "arrange" an explanation for their absence from home, school or job. Minors already have difficulty obtaining money, transportation and time off from school and jobs to get abortions, not to speak of time away from home, that they need to tackle the by-pass proccedures.[24]

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[24] A.C.L.U. Reproductive Freedom Project, Parental Notice Laws: Their Catastrophic Impact on Teenagers' Right to Abortion 15 (1986).

In a study of the court bypass procedure in Minnesota, for example, it was found that frequently the abortion could not be performed on the same day as the court hearing. The teenager, therefore, had to arrange, pay for and explain away two absences.[25] In Minnesota, minors who have appeared in court have been almost exclusively from middle and upper class suburban families; minors who were poor or who live in more rural areas of Minnesota were apparently unable to take advantage of judicial bypass[26].

Nationwide surveys have shown that parents whose daughters have had to travel to another county for an abortion were very likely to know about the abortion[27]. This fact supports the

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[25] Id. See also, Donovan, Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions, 15 Fam. Plan. Persp. 259 (1983).

[26] Id. at 260.

[27] Torres, Forrest & Eisman, Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services, 12 Fam. Plan. Persp. 284 (1980).

assertion that it is difficult for a teenager to make arrangements to be absent from home or school and to travel any significant distance without arousing her parents' suspicions. Consequently, pregnant teens who absolutely can not tell their parents of their pregnancy or planned abortion, -- the young women whom the by-pass procedure was designed to benefit, -- will be forced to carry to term, self-abort, have an illegal abortion or worse.[28] This problem can only be exacerbated for a young girl who has to arrange a court appearance in addition to an abortion.

Bureaucratic inefficiency and problems inherent in the by-pass procedure further add to

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[28]. Figures indicate that a large percentage of teenage girls who attempted suicide or succeeded in committing suicide before abortion was legal and accessible to minors thought they were or actually were pregnant. See Teicher, A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide, in Current Issues of Adolescent Psychiatry 129, 136 (Schoolar ed. 1973).

the unnecessary delay and to the physical and emotional hardships that the procedure visits upon the rural poor. There is no reason to believe that the situation in Ohio would be unlike that in Massachusetts and Minnesota, where many judges simply refuse to hear abortion petitions[29]. Consequently, in these two states young girls have had to travel long distances to find judges willing to hear their petitions. In fact, in one eight-month period in Minnesota, of the 1,478 petitions heard, 97% were filed in Minneapolis, St. Paul and Duluth[30]. This was so even though according to the Minnesota statute all 87 county juvenile courts are required to hear abortion petitions[31]. In Minneapolis, 50% of the minors going to court are not residents of

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[29] Donovan, Judging Teenagers at 264.

[30] Id.

[31] Blum, Resnick & Stark, The Impact of a Notification Law on Adolescent Abortion Decision-Making, 77 Am. J. Pub. Health 619 (1987).

the county in which that city is located[32]. At one time only six state court judges were hearing approximately 90% of the petitions to waive the notice requirement in Minnesota[33].

In Massachusetts, which also has a parental notice and by-pass procedure, abortion is the only issue from which judges routinely disqualify themselves on the basis of personal beliefs[34]. Although there are 62 judges distributed among the 14 superior courts in the 14 counties, the judges rotate among different cities each month, and it is not at all uncommon to find that all the judges assigned to a particular county are among those who refuse to

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[32] Donovan, Judging Teenagers at 264.

[33] Parental Notice Laws: Their Catastrophic Impact on Teenagers' Right To Abortion 17, (A.C.L.U. Reproductive Freedom Project) (1986).

[34] Melton, Legal Regulation of Adolescent Abortion: Unintended Effects, 42 Am. Psychologist 79 (1987).

hear petitions[35]. Young girls are frequently faced with coping with the logistics of traveling to another county, with the difficulties of travel being exacerbated by youth and poverty.

Even a minor who lives in a more rural area with easy access to a courthouse may, nevertheless, feel compelled to travel to another court in order to preserve her privacy. In rural areas, it is more likely that the girl or her family will be known in the community and that her appearance in a small courthouse will lead to speculation[36]. Reports indicate that many minors do not seek hearings before judges in their home counties even where such hearings were available, because they were afraid of being recognized by people who worked in and around the courthouse. One can imagine how frequently these situations

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[35] Donovan, Judging Teenagers at 265, quoting, Jaime Sabino, Chair of the Steering Committe of the Lawyers Referral Panel.

[36] Id. at 264.

might arise in rural courthouses when similar encounters are experienced with surprising frequency even in large cities. Public defenders in Duluth (population 92,811) have reported numerous cases of representing the children of their co-workers. In one case, they represented a judge's niece who waited in the bathroom of the courthouse until the hearing so she would not be recognized[37].

Minors would endure the added expenses, the further delay and the overall burdens of traveling to a distant city, all to preserve confidentiality[38]. If, in fact, her anonymity cannot be preserved in a local courthouse, a minor has no alternative other than to travel to another city and another court. While she determines where to go and how to get there,

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[37] Transcript of Record at 523, Hodgson v. Minnesota, Civ. No. 3-81538 (D. Minn. January 23, 1985) (Testimony of Maria Honkala).

[38] Parental Notice Laws, supra, note at.

critical time elapses, which will make the eventual abortion more dangerous and more expensive[39].

D. The Burdens of the By-Pass Are Exacerbated By Poverty

Poverty -- which is disproportionately experienced by women of color -- exacerbates the preclusive effects of the by-pass procedures. If the pregnant teenager is from a poor family her willingness to use the judicial by-pass and to navigate it successfully becomes even more doubtful. The willingness to avail onesself of the judicial system generally, depends, at least in part, on the expectation that it will be a benefit to the user; that it will be worth the time and effort. For the poor, their life situation works against the expectation that dealing with the courts and official agencies

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[39] Id.

generally will result in a net gain.[40] Social researchers have concluded that:

> The poor [wo]man's conviction of the futility of purpose or effort is also reinforced by the character of h[er] experience with the legal system. H[er] encounters with the law typically occur with police, probation officers, process servers and welfare workers, involving, therefore, direct contact with those agents of the law who seek to control if not punish h[er]. This leads to a negative if not openly antagonistic attitude toward the legal system, to a conception of the law as something that works against h[er] interests, as a source of deprivation and abuse, rather than as a viable or effective resource for vindicating rights.[41]

A pregnant teenager from a poor family is likely to have all of these negative and, unfortunately, quite justified feelings of victimization toward the legal system. A pregnant teenager who does not want to involve her parents in her abortion decision finds herself dependent on a system that she does not

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[40] H. Carlin, Civil Justice and the Poor (1966).

[41] Id. at 72-73.

trust to protect her anonymity, that she is not familiar with, that she feels victimized by, and that causes increased delays may feel forced to make other decisions dangerous to her physical and emotional health.

E. The By-Pass Procedure Creates Delay And, Therefore, Increases The Health Risks Associated With Abortion

For all minors the by-pass creates delay in obtaining an early abortion which significantly increases health risks. Even where a large urban area is accessible to the minor, judicial bypass requirements impose significant burdens.[42] The dangerous delay caused by the sometimes fruitless search for a confidential forum is pointless and unfair. Data from both

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[42] The proximity of several large urban areas to the more rural counties in Ohio will not necessarily assure anonymity to minors who are able to arrange to travel. One young girl encountered her entire school class on a field trip to the courthouse while she was waiting to see a judge. Melton, Legal Regulation of Adolescent Abortion at 80. Melton, Legal Regulation of Adolescent Abortion at 80.

Massachusetts and Minnesota indicates that essentially all petitions which are able to get to court are granted[43]. No state interest can possibly be served, because no screening is done and virtually no minors are denied an abortion without notification. In one two-year period in Massachusetts, only five of 1,300 petitions filed were denied. Of those denied, three were overturned on appeal, one was refiled and granted by another judge and the last child obtained an out of state abortion[44]. In Minnesota, in nearly five years of judicial hearings, every young woman was found to be a mature or best interest minor[45]. Judge Allen Oleisky, who was one of six judges who had heard 90% of the abortion

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[43] Id. Donovan, Judging Teenagers, at 264.

[44] Id.

[45] Id.

petitions in Minnesota at the time of the Hodgson trial, testified at that trial that his participation in an abortion hearing was "like a routine clerical function on my part, just like putting my seal and stamp on it."[46]

The problem is not that these judges are not doing the job required of them by the legislature; but rather that the job is unnecessary. The cost, however, is great. The pregnant teen is forced to risk her anonymity, undergo additional expense and endure increased physical and emotional trauma. As one judge stated: " The law is a vehicle for making abortion more difficult for minors to obtain. That's all it is."[47]

Unfortunately, for those who finally do gain access to the court, critical time will have

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[46] Parental Notice Laws at 17, citing Transcript of Record, Hodgson v. Minnesota, Civ. No. 3-81538 (D.Minn. January 23, 1985) (Testimony of Judge Allen Oleisky).

[47] Donovan, Judging Teenagers, at 267.

been lost. After the first eight weeks of pregnancy, the risk of major complications from an abortion increases approximately 15% to 30% for each week of delay[48]. Teens are already at risk; they initially delay dealing with their pregnancies for reasons such as cost, ambivalence or denial, desire for secrecy, difficulty in scheduling appointments and lack of knowledge about the health care system[49]. In the case of younger teens, lack of knowledge about their own bodies is also a significant factor. Many still have irregular menstrual cycles and simply fail to recognize the early signs of pregnancy[50].

All of the increased difficulties which

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[48] Cates & Grimes, Morbitity and Morality of Abortion in the United States, in Abortion and Sterilization: Medical and Social Aspects, 155 (Hodgson ed. 1981).

[49] Adolescent Abortion, Psychological and Legal Issues (Gary B. Melton ed. 1986).

[50] Risking The Future: Adolescent Sexuality, Pregnancy and Childbearing, Vol. I (Hayes ed. 1986).

the judicial by-pass procedure creates especially for rural and poor pregnant teens result in dangerous delays. Statistics indicate that the parental notification law in Minnesota increased the percentage of minors having second trimester abortions by 26.5%. This increase in second trimester abortions was contrary to the national pattern of increasingly greater numbers of first trimester abortions[51].

Delay in seeking and obtaining an abortion has the largest single effect on the risk to teenagers of complications and death from abortion. Delays of only one week increase the medical risk to a significant degree[52]. In Minnesota, judicial bypass proceedings result in minors typically being required to wait two or three days from their first contact with a court for an actual hearing on the petition. This

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[51] Parental Notice Laws 15.

[52] Donovan, Judging Teenagers, at 260.

delay, when combined with other factors such as scheduling difficulties with a clinic, can stretch the time to complete this judicial process to a week or more[53]. This is the reality even though the Minnesota statute states that minors are to have access to the courts 24 hours a day, seven days a week[54]. In Massachusetts, evidence indicates that in many cases a seven day delay occurred before a hearing could be scheduled, and even then a minor would arrive at the courthouse only to find that there was no judge available[55]. The Ohio statute could require as much as 22 days. Akron, 866 F.2d 852, 866 (6th Cir. 1988).

Clearly, there is a grave danger that the concern about privacy may create dangerous delay. This is particularly true for younger minors who

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[53] Id. at 260-261.

[54] Id. And see, Minn. Stat. §144.343 (2)-(7) (1988).

[55] Id.

have delayed initiating the process and who have faced significant obstacles in gaining access to the system. To penalize those young girls who feel they cannot confide in their parents, by putting one more obstacle in the way of obtaining a safe abortion serves no justifiable purpose.

III. REQUIRING PREGNANT TEENAGERS TO NOTIFY THEIR PARENTS OF THEIR DECISION TO OBTAIN AN ABORTION, OR IN THE ALTERNATIVE, OBTAIN A JUDICIAL ORDER EXCUSING THEM FROM DOING SO SERVES NO IMPORTANT, LET ALONE LEGITIMATE STATE INTERESTS

To withstand scrutiny, a state statute that burdens a minor's right to choose an abortion must serve important state interests, must be narrowly drawn to protect those interest only, and must not violate the gurantees of the Constitution. H.L. v. Mattheson, 450 U.S. 398, 413 (1981). Ohio's requirement to either notify their parents of their decision to obtain an abortion or obtain a judicial by-pass is clearly invalid under this standard.

First the state argues that the

notification requirement serves to protect a minor from an uninformed decision. (Brief of Appellant at p. 23). Experiences with judicial by-pass statutes demonstrate that teenage women are overwhelmingly capable of making informed decisions, and, therefore, that this interest is in no way served.

Second, the state asserts the importance of its interest in "encouraging parental consultation." Id. If the statutes were simply "encouraging" consultation, amici might have no quarrel. There is, however, considerable distance between voluntary and compulsory consultation. Many teenage women voluntarily inform their parent or parents, and that those who do not have very substantial reason therefor.

Requiring pregnant adolescents to either notify their parents of their decision to seek an abortion or seek a court order serves no important, let alone legitimate, interest. Countless studies demonstrate that parental

notification statutes subject even pregnant adolescents who notify their parents to additional stress, anxiety, and delay, thus, increasing the risks involved in abortion procedures.[56] This risk is further increased for teenagers who choose not to inform their parents, and, thus have to obtain a court order. See Point II, supra at 30-36. Moreover, in too many instances the impossibility of utilizing the bypass renders the notification requirement tantamount to providing a minor's parents with an absolute veto over the teenager's decision to

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[56] In Point II, E, Amici discussed the problem of delay occasioned by the by-pass and the deleterious health consequences thereof. Studies indicate that young women's abortions are delayed as a result of any need to tell their parents. And Respondents in one study under 18 were also 39 percent more likely than those 18 years or older to delay their abortion because of fear of telling their parents and their lovers. One researcher young women whose pregnancies were the result of rape or incest, were 35 percent more likely than those whose pregnancies did not so result, to have delayed their abortions because they were afraid to tell anybody. A. Torres and J.D. Torres, Why Do Women Have Abortions, 20 Family Planning Perspectives 175 (1988).

obtain an abortion. Bellotti v. Baird, 443 U.S at 642-643 (1979); Danforth, 428 U.S. at 74.

In essence, mandatory notification laws like Ohio's law punish a pregnant minor, but not her parents, for the lack of intra-family communication on the issues of sex and sexuality. It is well known that communication between parents and adolescents, particularly concerning sex is at best minimal and, at worst, non-existent.[57] As P. Scals and K.A. Everly noted, "family sexual communication is generally characterized by silence, rule-making and the exercise of authority more than by the exploration of values in a verbal atmosphere of

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[57] See e.g., Eileen H. Hepburn, A Three-Level Model of Parent-Daughter Communication About Sexual Topics, 18 Adolescence 523 (983); Chess, S. Thomas, A.E. Camersoon, M. Sexual Attitudes and Behaviour Patterns In A Middle Class Population, 46 American Journal of Ortho-psychiatry, 690-101. (1976).

cooperative disagreement and influencing."[58] If the parent has not created an environment which encourages exchange, it is highly unlikely that a minor, who has never discussed her sex life before, would eagerly do so when she became pregnant.[59]

Similarly, parental notification and judicial by-pass provision requirements only enhance the harm already done to teenagers by the larger society's failure to educate American youth about sexuality[60] contraception, and safe sex, which has become so critically important as

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[58] P. Scales & K. Everly, A Community Sex Education Program For Parents, The Family Coordinator, 1977, 26, 37-45.

[59] See e.g. R. Blum, M. Resnick, & T. Stark, The Impact of a Parental Notification Law On Adolescent Abortion Decision-Making, 619 Am. J. Pub. Health (1987).

[60] See e.g., J. Henshaw and Jane Silverman, The Characteristics and Prior Contraception Use On U.S. Abortion Patients, 20 Family Planning Perspectives 158 (1988).

a result of the AIDS epidemic.[61]

In addition, pregnant minors who are required to notify their parents risk may suffer long-term psychological damage as a result of the notification. Although having an abortion may be stressful, it rarely leads to long-term emotional distress. In fact, the predominant response among both adult and teenage women following an abortion is generally relief.[62] Periods of regret, depression and guilt, if they occur at all, are mild and diminish rapidly. By contrast, parental opposition to the decision to abort has been shown to result in higher levels of anxiety, depression and hostility following the abortion.[63]

In essence, the mandatory notice laws are

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[61] See e.g., G. Kolta, "AIDS Is Spreading in Teen-Agers: A New Trend Alarming to Experts", The New York Times, p.1, col. 1, October 8, 1989.

[62] Id. at 110.

[63] Id.

casting upon the teenager the burden of adult failures. If the environment for open and supportive communication and guidance has not been created in the home or society, should we hold the child or the parent responsible? The mandatory notification law puts the burden -- sometimes an irreparable one -- on the child. As Justice Stevens noted in Carey v. Population Services Intl.: "It is almost unprecedented ... for a State to require then an ill-advised act by a minor give rise to greater risk of irreparable harm than a similar act by an adult." 431 U.S. 678, 714 (1977). Parents, legislatures and public officials have available many voluntry educational alternatives to assure informed decision-making by minors and to facilitate better communication about sex and reproduction between teenagers and their parents. While there is little doubt that improved communication and mutual respect between parents and adolescents is desirable, it is a cardinal principle of the due-

process clause that the State cannot seek to accomplish desirable objectives though means that subject people to avoidable harm. Mandatory notice and the judicial bypass -- either inaccessible or experienced as a shaming ceremony -- subject the most vulnerable young women to avoidable and potentially life-shattering harm in a context where there is no demonstrable benefit.

Justice Steven's warning about the fundamental premise of due process is equally applicable here:

> Although the State may properly perform a teaching function, it seems to me that an attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate. The propaganda technique used in this case significantly increases the risk of unwanted pregnancy and veneral disease. It is as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse.

> Even as a regulation of behavior, such a statue would be defective. Assuming that the State could impose a uniform sanction upon young persons who risk self-inflicted harm by operating motorcycles, or by engaging in sexual activity, surely that sanction could not take the form of deliberately injuring the cyclist or infecting the promiscuous child. If such punishment may not be administered deliberately, after trial and a finding of guilt, it manifestly cannot be imposed by a legislature, indiscriminately and at random. This kind of government-mandated harm, is, in my judgment, appropriately characterized as a deprivation of liberty without due process of law.

Id. at 715-716.

CONCLUSION

For all these reasons, the Ohio statute should be declared unconstitutional.

Respectfully submitted,

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APPENDIX

STATEMENTS OF INTERESTS

A WOMAN'S PLACE of Doylestown, Pennsylvania provides shelter, counseling and legal advocacy to victims of domestic violence. Often, these are women with several young children who have no other resources. As part of our philosophy of empowerment for women, we are committed to reproductive and medical assistance for all women, regardless of their economic status.

* * *

The AMERICAN INDIAN HEALTH CARE ASSOCIATION is representative of the 35 urban Indian health programs nationally to provide health care to over 200,000 American Indians annually. The purpose of the American Indian Health Care Association is to work towards improving health status to American Indians to the highest possible level. The vast majority of urban Indian patients are low income and generally without alternative health care services and delivery. The American Indian Health Care Association recognizes that it is a woman's right to choose in terms of birth control and pregnancy.

* * *

The ASIAN AMERICAN LEGAL DEFENSE AND

EDUCATION FUND (AALDEF), founded in 1974, is a non-profit organization that addresses the legal needs of Asian Americans in New York and nationwide. AALDEF works with immigrant, low-income, and monolingual Asian American women, both in its general work and through its Women's Project. We believe that the framework established by Roe v. Wade has been beneficial to this segment of the Asian American Community, which is part of the community of poor women, working women and women of color represented by this amicus effort, and therefore join this brief in support of plaintiffs-appellees in this case.

* * *

The BROOKLYN YWCA (YOUNG WOMEN'S CHRISTIAN ASSOCIATION) is part of the oldest worldwide women's membership organization dedicated to empowering women. The Brooklyn YWCA works to carry out the national YWCA imperative "to eliminate racism" and as such opposes any effort to restrict the access of poor and young women to quality health care services, as well as any attempt to deny them their right to reproductive freedom.

* * *

CHOICES WOMEN'S MEDICAL CENTER is a New York State licensed medical facility serving over 30,000 patients a year in the New York City area for family planning, abortion and pre-natal care. Since its founding in 1971,

Choices Women's Medical Center has been at the forefront of insuring high quality feminist women's health care to its patients and fighting politically to retain the right to choose.

* * *

The COMMITTEE OF INTERNS AND RESIDENTS (CIR) is the nation's oldest and largest housestaff union, representing over 5,000 interns, residents and fellows in New York, New Jersey and Washington, D.C. For over 30 years, the CIR's struggle to improve residents' working conditions has been inseparable from its fight for quality patient care. The CIR strongly supports the right of all women to safe, legal birth control and

abortion.

* * *

The D.C. RAPE CRISIS CENTER was established in 1972 to provide services to sexual assault survivors. The Center is interested in this case because we maintain a strong concern for issues that affect women, particularly low-income women and women of color. We believe that issues of economics, health, justice, education, etc. are all intertwined. Though our primary focus is violence against women, we consistently support actions that promote justice for women, which includes the right to reproductive freedom.

* * *

The FEMINIST WOMEN'S HEALTH CENTER of Atlanta and Athens, Georgia is a non-profit organization established by women in 1977 to advocate, promote and protect reproductive rights for all women. Our goal is to enable women to make informed choices about their health care and reproduction through the provision of self-help health education and gynecological services. We work with others locally, nationally and internationally to insure that women have the information and power to control their bodies and their lives. Historically when abortion has been made illegal and/or inaccessible <u>all</u> women are denied the right to control their bodies and their lives and poorer women suffer

disproportionately.

* * *

The HISPANIC HEALTH COUNCIL is a research, training, and advocacy organization devoted to the improvement of the health and mental health status of Latinos, especially in the Hartford and Northeast region. Specifically, the Council seeks to reverse the current quality and quantity of health care services by improving them through information collection, education to providers, and advocacy at the local, state, and federal level. The Council has numerous projects on child abuse prevention, maternal-child health, reproductive health, substance abuse prevention, and AIDS research and prevention.

* * *

The JUDSON MEMORIAL CHURCH in New York's Greenwich Village is affiliated with both the American Baptist Church and the United Church of Christ. In 1967 it founded the Clergy Consultation Service on Abortion, a national organization of ministers, rabbis and nuns who counseled thousands upon thousands of women with "problem pregnancies" and referred those who chose abortion to physicians willing to perform them despite the law. The Clergy Consultation Service on Abortion disbanded in 1973 when the Supreme Court decision in Roe v. Wade was handed down.

* * *

MY SISTER'S PLACE of Washington D.C. is

a shelter for battered women and their children. For ten years we have sheltered, advocated for, counseled with and been a friend to 2000 women and children who have been forced to leave their homes in order to find physical safety, peace of mind, and the right to make their own choices. My Sister's Place is a vehicle to self-determination for women whose right to choose has been invalidated. The right to self-determination, including how it extends to the right to choose abortion, is the principle upon which we are founded.

* * *

The NATIONAL CENTER FOR LESBIAN RIGHTS (NCLR, formerly the Lesbian Rights Project) in

San Francisco, California is a non-profit, public interest law firm dedicated to eradicating sexual orientation-based discrimination. For over a decade, NCLR has represented women in both state and federal courts in their efforts to preserve the privacy and integrity of their personal and family lives. NCLR attorneys have authored numerous law review articles and publications on privacy-related issues.

* * *

The NATIONAL RAINBOW COALITION, WOMEN'S COMMISSION

STATE CHAPTER is a broad-based coalition of multi-racial ethnic, socio-economic and issue-oriented people from across the state of New

York that are fighting for a better social environment for all the people of this state, particularly the "have-nots" in our society. We believe that women, particularly women of color and poor women, must have the right to safe legal abortions, and that access to legal abortions must be maintained. Furthermore, we believe that "the intentions of governments are written into the budgets." With this ir mind we believe that the federal government and the government of the state of New York must continue to provide funds for poor women to obtain abortions.

* * *

The NATIONAL WOMEN'S POLITICAL CAUCUS (NWPC) of Washington, D.C. is a nonprofit

organization supporting the appointment and election of women to public office. NWPC also supports legislative initiatives at state and national levels to insure fairness and equity for all Americans. As an organization comprised of white women and women of color working together, we recognize and work to overcome the particular problems faced by women of color, particularly those who are poor, in receiving adequate health care and in safeguarding their right to choice in reproductive decisions.

* * *

NEW DIRECTIONS FOR WOMEN (NDFW), a feminist newspaper in Englewood, New Jersey, is committed to publishing the many voices of

feminism. We believe the diversity of the women's movement must be seen as one of its strengths. NDFW believes that when we understand the pervasive force of sexism, we will act to effect change. We support every woman's right to reproductive control. We wholeheartedly support Roe v. Wade and urge the Court to leave it intact.

* * *

The NEW YORK ASIAN WOMEN'S CENTER, INC. is a battered women's shelter program serving primarily battered women and their dependents in the Asian communities of New York City. We are committed to creating safe options for women, including issues concerning reproductive choice. Some of the women that

we work with rely on public funding for abortion services; without such funding these women's lives are in serious jeopardy.

* * *

The PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND is a national organization based in New York City dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos. The Fund's litigation efforts focus on the areas of employment, education, housing and voting rights, with a particular emphasis on safeguarding the rights of Puerto Ricans of low economic status. Puerto Rican women and other women of color are particularly vulnerable to discrimination and therefore the

Fund supports efforts to protect their rights. The Fund opposes any efforts to overturn or in any way restrict the rights recognized in Roe v. Wade.

* * *

UNITED LABOR ACTION (New York City) is a national network of unionists, labor activists and unemployed workers, whose members, including many women, are of all nationalities who organize for workers' rights, with special concern for the poorest and unorganized. It supports the right of working women to have their right to privacy in making personal decisions about their lives as one aspect of having an equal place at the work place and in society. It views that working women must be

guaranteed choice in reproductive matters with safe, legal, affordable abortions, Medicaid funding, if needed, and decent jobs, pay equity, child care, parental leave and low-cost health care in order to decide whether or when to have children. Poor and working women have always had abortions; many died as a result prior to Roe v. Wade. To deny this right would hurt millions of working women, especially the poorest -- service workers, part-time and temporary workers, and minimum-wage earners, of which 60% are women. It would fall heaviest upon and discriminate against Black, Latina, Asian and Native American women who form a disproportionately high number of the poorest workers and would

again be forced to resort to unsafe abortions.

* * *

WOMEN OF ALL RED NATIONS, MINNESOTA in Minneapolis, Minnesota works for the personal and political empowerment of Native women on the grassroots level. We aim for sovereignty and self-determination for our people. It has been our experience that when women are denied the basic human right to control our own bodies, we are vulnerable to many kinds of abuse. Women of color in particular must retain the means to resist genocide.

* * *

The WOMEN'S ACTION ALLIANCE, located in New York City, is a national organization founded in 1971 dedicated to the full equality

of all women. While we work toward this end by providing educational programs and services to women and women's centers around the country, we recognize that any progress toward equality is impossible when women do not maintain the right to control their own bodies. The right of <u>all</u> women to a safe and legal abortion, regardless of race or economic status, is intrinsic to any notion of gender equality and a central tenet is the struggle of women everywhere for individual dignity and self-determination.

* * *

The WOMEN'S PROJECT in Little Rock, Arkansas is a community-based nonprofit organization committed to the elimination of

sexism and racism. Since 1981, the Women's Project has provided community education and assisted women in organizing around: violence against women and children; women's economic issues, especially those affecting low income women; and social justice issues such as sexism, racism, homophobia, ageism, ableism, classism and anti-Semitism.

* * *

The WOMEN'S STUDIES PROGRAM OF HUNTER COLLEGE in New York City is a cross-disciplinary program of academic courses, research and public education that involves some sixty faculty members, 2,000 students, and ongoing relations with many community organizations. Many of our courses, the

scholarly research of our faculty, and our overall philosophy are concerned with expanding women's reproductive freedom. Maintaining full access to safe, legal abortion for all women is critical to this purpose.

* * *

The WORKERS WORLD PARTY is a national multi-chapter organization based in New York City whose members include working and poor women, youth, lesbians, seniors, disabled, unemployed and women on fixed incomes. It believes that every woman must be guaranteed choice and privacy regarding the critical and very personal issue of whether or when to have children and the right to control their own

AMICUS CURIAE

BRIEF

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Nos. 88-805, 88-1125, 88-1309

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On Appeal from the United States Court of Appeals for the Sixth Circuit

JANE HODGSON, M.D., *et al.*,

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF HODGSON CROSS-RESPONDENTS AND AKRON APPELLEE FOR 13 INDIVIDUAL MEMBERS OF THE PANEL ON ADOLESCENT PREGNANCY AND CHILDBEARING OR THE COMMITTEE ON CHILD DEVELOPMENT RESEARCH AND PUBLIC POLICY

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
DESCRIPTION AND INTEREST OF *AMICI CURIAE*	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. INTRODUCTION	6
II. PARENTAL NOTIFICATION REQUIREMENTS FOR MINORS SEEKING ABORTIONS ARE UNLIKELY TO PROMOTE CONSTRUCTIVE PARENT-CHILD CONSULTATION	7
III. THE CHALLENGED NOTIFICATION STATUTES DO NOT FURTHER ANY DOCUMENTED SIGNIFICANT PSYCHOLOGICAL OR COUNSELING NEED OF ADOLESCENTS	11
A. The Psychological Considerations	11
B. The Counseling Considerations	14
IV. PARENTAL NOTIFICATION REQUIREMENTS IMPOSE SUBSTANTIAL, UNJUSTIFIED BURDENS ON PREGNANT MINORS	16
A. Notification Requirements Result In Delays Which May Lead to Increased Health Risks	16
B. The Delay Caused By Parental Notification Statutes Disproportionately Burdens Minors Because Of Their Limited Access To Abortion Facilities	19
CONCLUSION	21

TABLE OF AUTHORITIES

CASES: Page

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Page

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DESCRIPTION AND INTEREST OF *AMICI CURIAE*

Amici are individuals who were members of either the Panel on Adolescent Pregnancy and Childbearing ("Panel") or the Committee on Child Development Research and Public Policy ("Committee") of the National Research Council.[1] Seven members of the Panel and six members of the Committee are *amici* here.[2]

The Committee on Child Development Research and Public Policy is an interdisciplinary body within the National Research Council. In 1983, the Committee established an expert, interdisciplinary panel to study the problems of adolescent pregnancy and childbearing.[3] The study was initiated, in part, to correct a perceived imbalance between general beliefs about the problems associated with adolescent sexuality and the scientific and other empirical data that had been collected about those issues. *Risking the Future* at ix-x.

The Committee selected Panel members who could bring a diverse range of expertise, experience, and political and philosophical points of view to the study. *Id.* at x. These Panel members included physicians, psychologists, professors of medicine, social scientists, a professor of law, an historian, and an economist. *Id* at iii-iv.

---

[1] The National Research Council is the principal operating agency of both the National Academy of Sciences and the National Academy of Engineering in the conduct of their services to the government, the public, and the scientific and engineering communities.

[2] This brief is filed on behalf of the listed *amici* as individuals, not on behalf of the Panel (which was disbanded in 1986 upon completion of its study), the National Research Council or the National Academy of Sciences.

[3] National Research Council, *Risking the Future, Adolescent Sexuality, Pregnancy, and Childbearing*, Vol. I at x (1987) (hereinafter cited as "*Risking the Future*").

The Panel members are authors of numerous textbooks, scholarly articles, and research reports in the areas of medicine, science, sociology, adolescent development and sexuality, and child psychology and are affiliated with over twenty universities (including law and medical schools) and research institutes. Many of the institutions and organizations with which the Panel members are affiliated have a specific focus on children and adolescents.

The Panel was charged with a three-fold mission: (1) to collect, integrate and evaluate data on trends in teenage sexual behavior; (2) to review and synthesize research on the antecedents and consequences of adolescent pregnancy and childbearing; and (3) to review and assess alternative preventive and ameliorative policies and programs. *Id.* at x. Over a two-year period, the Panel studied the initiation of sexual activity among adolescents, contraceptive use, pregnancy, pregnancy resolution, and the consequences of teenage pregnancy, childbearing, and parenting as well as the cost and effectiveness of policies and programs designed to address those areas. *Id.*[4]

In conducting its study, the Panel acknowledged that the issues surrounding adolescent pregnancy are both complex and controversial. As a scientific body, the Panel sought to "clarify the issues, sharpen awareness of crucial decision points, and define limits of existing knowledge" without injecting moral, philosophical or political ideology into its report. *Id.* at xi. The Panel's objective was "to inform the policy debate by clarifying the scientific issues." *Id.* at 5.

---

[4] Five private foundations, the Rockefeller Foundation, the Ford Foundation, the William and Flora Hewlett Foundation, the Robert Wood Johnson Foundation, and the Charles Stewart Mott Foundation provided support for the study. *Id.* at x, xiii.

Risking the Future, Vol. I (1978), is the Panel's final report.[5] In the report, the Panel members unanimously endorsed three comprehensive policy goals, within which they set forth specific conclusions and recommendations. *Id.* at 5. In order of priority, the Panel's primary goals were to:

(1) Reduce the rate and incidence of unintended pregnancy among adolescents, especially among school-age teenagers;

(2) Provide alternatives to adolescent childbearing and parenting;

(3) Promote positive social, economic, health, and developmental outcomes for adolescent parents and their children.

Consistent with its overall approach, the Panel studied information regarding the availability of abortion services to adolescents in a non-ideological context. While the Panel stressed that it "strongly prefers prevention of pregnancy to avoid parenthood," it recognized that abortion is a legal alternative for adolescents for whom pregnancy prevention fails and devoted some attention to the issues associated with pregnancy termination. *Id.* at 6.

As individual members of the Panel or the Committee, *amici* wish to direct this Court's attention to the conclusions set forth in *Risking the Future* and the studies described therein. Specifically, the undersigned *amici* believe that the data reviewed by the Panel and the conclusions that can be drawn therefrom may provide the

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[5] Before it was issued, *Risking the Future* was reviewed by several independent bodies, including the Committee, the review board of the Commission on Behavioral and Social Sciences and Education, a report review committee of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine, and a number of independent, outside reviewers.

Court with relevant empirical evidence which will assist it in its examination of the parental notification provisions that are currently before the Court.

SUMMARY OF ARGUMENT

There is no empirical evidence that mandatory parental notification provisions foster parent-child communications about abortion. Many teenage girls voluntarily choose to inform one or both parents about an unwanted pregnancy. Teenagers who do not wish, for whatever reason, to consult with their parents, go to great lengths to avoid complying with statutes that would require them to do so. There is no basis for concluding that the interests of these minors are well-served by the notification statutes that are intended to protect them.

There also is no scientific evidence that pregnant minors are especially vulnerable to psychological harm from an abortion, are unable to make a reasoned decision about whether to obtain an abortion or are more likely than adults to suffer adverse medical consequences from an abortion. There is, however, empirical data that indicates that parental notification requirements increase the likelihood that a pregnant teenager will delay obtaining an abortion. Teenagers appear to suffer a disproportionate burden from such delay, including, in some cases, postponement of abortions until the second trimester, when health risks increase. Thus, a fair reading of the available empirical data tends to indicate that parental notification requirements actually may harm pregnant minors without conferring substantial off-setting benefits.

ARGUMENT

I. INTRODUCTION

Since 1973, abortion has been a legal option for all women in the United States. Pregnant minors, as well as adult women, have a constitutionally protected right to choose to have an abortion, for "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). Nevertheless, the circumstances under and the manner in which minors may take advantage of their legal option to terminate an unwanted pregnancy have remained special and emotional issues for policy makers and the courts. *See Risking the Future* at 9. The perception that a minor's decision to obtain an abortion raises unique emotional, health or family-interest issues has spawned legislation specifically regulating the manner in which minors may obtain abortion services. *See generally Planned Parenthood Association of Kansas City v. Ashcroft*, 462 U.S. 476 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). Such regulations often are based on the articulated goals of promoting the emotional and physical welfare of the minor and the state's interest in intra-family harmony and unity. *See, e.g.*, Brief of Cross-Petitioners, State of Minnesota, *et al.* at 22-34 (hereinafter "Minn. Br."); Brief of Appellant, State of Ohio at 24 (hereinafter "Ohio Br."). When state regulations impinge upon a constitutionally protected right, however, they must be narrowly tailored to serve a legitimate state interest. *Carey v. Population Services International*, 431 U.S. 678, 686, 688 (1977); *Roe v. Wade*, 410 U.S. 113, 155 (1973).

No one, including *amici*, would quarrel with the laudable goals of promoting family communication and protecting pregnant minors. It is the opinion of these *amici*, however, that these articulated goals are not well-served by the forced intervention of parents or the state into the abortion decision. In the opinion of these *amici*, the doubtful efficacy of notification requirements, particularly when weighed against the burdens they impose on a minor's right to obtain an abortion, raises serious constitutional questions.

These *amici* believe that the comprehensive study of adolescent pregnancy set forth in *Risking the Future* brings a unique and empirically-based perspective to these controversial issues. On the basis of the available data, the *Risking the Future* Panel concluded that parental involvement in an adolescent's decision to seek an abortion should not be mandated; that "minor adolescents should be encouraged, but not required, to involve their parents and partners in the decision-making process." *Risking the Future* at 9-10, 278-79. The Panel's conclusion was based on two subsidiary findings—the lack of a scientific basis for restricting the availability of abortion to adolescents and the delay and attendant health risks which often accompany parental consent requirements. *Id.* As set forth below, it is the opinion of *amici* that the findings set forth in *Risking the Future* and described herein cast grave doubts on the effectiveness and desirability of such restrictions.

II. PARENTAL NOTIFICATION REQUIREMENTS FOR MINORS SEEKING ABORTIONS ARE UNLIKELY TO PROMOTE CONSTRUCTIVE PARENT-CHILD CONSULTATION

A purported purpose of both Minnesota and Ohio's parental notice requirements is the furtherance of parent-child communication. *See, e.g.*, Minn. Br. at 4; Ohio Br. at 24. *Amici* share the view that communication between adolescents and their parents is important and may have salutory effects on many aspects of adolescent sexual be-

havior.[6] Indeed, the Panel concluded that adolescents should be encouraged to involve their parents in the process of pregnancy testing and counseling, *Risking the Future*, at 279, in decision-making with respect to pregnancy resolution options, *id.*, *see also id.* at 281, and in decisions concerning childrearing for those minors who become parents. *Id.* at 286-87.

However, the empirical evidence analyzed by the Panel does not support the proposition that compulsory parental notification will make an appreciable difference in parent-child communications concerning an abortion decision. With or without compulsory notification requirements, parental attitudes about abortion appear to have a significant influence on a pregnant minor's decision to terminate a pregnancy. *Id.* at 113. The data compiled by the Panel indicates that "[m]ost school-age adolescents, especially very young teenagers, consult their parents in deciding to obtain an abortion." *Id.* at 114. For example, in one study,[7] a majority of the 1,170 un-

[6] However, there is little scientific evidence as to the actual effects of parent-child communication on adolescent decisions regarding sexual activity. Research on the effects of parent-child communication on sexual topics "has produced conflicting and inconclusive results." *Risking the Future* at 245-46; *see also id.* at 102-04, 149, 150. Although school- and community-based family planning programs reflect increasing efforts to involve parents, there is limited evidence upon which the effectiveness of these approaches may be measured. *Id.* at 145-46. The Panel stressed that "there is little scientific basis for understanding how these [communication-enhancement programs] are likely to affect teenagers' decisions to delay initiation of sexual activity or to be more diligent contraceptors." *Id.* at 246. While there is evidence that close parent-child relationships may be associated with less sexual activity among younger teenagers, *id.* at 103, this may not be true with respect to older minors. *Id.* Other analyses have not been able to establish a correlation between parent-child communication and the sexual activity of the child. *Id.* at 103.

[7] *Citing* Torres, Forrest, & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services* 12 Fam. Plan. Persp. 284 (1980) ("Torres").

married, minor abortion patients under the age of 18 surveyed indicated that their parents knew that they were obtaining an abortion. *Id.* at 192. Among very young teenagers, parental influence is particularly strong. *Id.* at 113.[8] Survey data suggests that the younger the patient, the more likely she was to report that her parents knew that she was seeking an abortion and the more likely it was that she was referred to the abortion clinic by her parents. *Id.* at 192.[9]

Indeed, adolescents tend to involve their parents in other areas pertaining to sexual activity even in the absence of parental notification requirements. For example, data indicate that 59% of teenagers seeking contraceptive services from clinics or other organized providers "are sure" or "think" their parents know of their intentions. *Id.* at 158. Of this group, a majority voluntarily told their parents, while for most of the others—and particularly in the case of girls 15 and under—their parents suggested the visit. *Id.*

However, the evidence also suggests that those adolescents who do not voluntarily consult with parents about abortion or other issues relating to their sexual activity probably would continue to avoid such notification, even were it legally required. In the case of abortion decisions, the Panel noted that approximately 25 percent of the teenagers surveyed in the Torres study said their parents did not know of their decision to terminate their pregnancy "and that they would not have come to the clinic if parental consent or notification were required."

[8] *Citing* Steinhoff, Premarital Pregnancy and the First Birth (1976) (Paper presented at the Conference on the Birth of the First Child and Family Formation, Pacific Grove, CA. Report on part of a larger study, Hawaii Pregnancy, Birth Control and Abortion Study. University of Hawaii); Rosen, *Adolescent Pregnancy Decision-Making: Are Parents Important?*, 15 Adolescence 43 (1980).

[9] *Citing* Torres, n.7, *supra*.

Id. at 192. A study reviewed by the Panel of the impact of Minnesota's parental notification requirement—the very statute at issue in *Hodgson*—similarly indicated that a sizeable minority of pregnant minors seeking abortions avoid notification requirements. *Id.*[10] Approximately 43 percent of adolescent minors surveyed in the Minnesota study took advantage of the judicial bypass alternative to parental notification instead of informing *both* parents of their desire to obtain an abortion; about a quarter of these minors reported having notified one parent. *Id.* at 192.

Similarly, among the substantial minority (41%) of teenagers surveyed who sought contraceptive services but did not tell their parents, a majority say they would not have come to a clinic if parental notification were required. *Id.* at 159.[11] Moreover, the second most common reason teenagers choose a family planning clinic rather than a private physician for contraceptive services, according to one study, is to ensure privacy. *Id.* at 160 (26% of adolescents went to clinics over private doctors because they feared doctors would tell their parents; 65% made the decision on the basis of cost).[12] *See also id.* at 273.

A reluctance to tell their parents also causes adolescents to postpone pregnancy testing, *id.* at 173, or, for those who choose to carry their child to term, to delay prenatal care. *Id.* at 198. Such delay is undesirable and

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[10] *Citing* Blum, Resnick & Stark, The Impact of a Parental Notification Law on Adolescent Abortion Decisionmaking (1985) (Unpublished manuscript, University of Minnesota).

[11] Some teens in the latter group would have foregone contraception entirely if required to tell their parents, *Risking the Future* at 159, thus substantially increasing the risk of an unintended pregnancy.

[12] *Citing* Chamie, Eisman, Forrest, Orr, & Torres, *Factors Affecting Adolescents' Use of Family Planning Clinics*, 14 Fam. Plan. Persp. 126 (1982).

dangerous both for teenagers who choose to carry their child and for those who ultimately decide to terminate the pregnancy. *See infra* at 16-20.

In sum, a majority of adolescents involve their parents in many decisions relating to their sexual activity, including, but not limited to, abortion. Younger adolescents are particularly likely to consult and be guided by their parents. However, a significant minority will avoid parental notification when such notification is required, often choosing to forego or delay seeking services instead of involving their parents. This evidence indicates to *amici* that parental notification statutes are unlikely to foster parent-child communication beyond that which already occurs voluntarily.[13]

III. THE CHALLENGED NOTIFICATION STATUTES DO NOT FURTHER ANY DOCUMENTED SIGNIFICANT PSYCHOLOGICAL OR COUNSELING NEED OF ADOLESCENTS

A. The Psychological Considerations

Among the justifications Minnesota and Ohio offer for the challenged statutes are that notification may, in various ways, ameliorate alleged adverse psychological consequences of an abortion. *See, e.g.*, Minn. Br. at 13-15; Ohio Br. at 46. In the opinion of these *amici*, such concerns are not based on scientific fact.

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[13] Pregnant minors are not a monolithic group. *Risking the Future* at 2, 19. *See also H.L. v. Matheson, supra*, 450 U.S. at 419 (1981) (concurring opinion) ("When a minor becomes pregnant and considers an abortion, the relevant circumstances may vary widely depending upon her age, maturity, mental and physical condition, the stability of her home if she is not emancipated, her relationship with her parents, and the like."). For this reason parental notification requirements affect different minors in different and possibly unpredictable ways. Broad-brush legislation, including the Ohio and Minnesota statutes at issue here seem, to these *amici*, particularly ill-suited to address such an inherently individualized and idiosyncratic issue.

At the time the Panel undertook its analysis, there were few studies of the psychological effects of abortion on adolescents, *Risking the Future* at 195, and most did not distinguish between adolescents and adults. *Id.* at 244. While a very few of the studies found that abortion had a slight but measurably more negative effect on the short-term emotional well-being of teenagers than on adult women, *id.* at 196, 244, most studies indicated that the abortion experience is simply not likely to cause severe emotional problems. *Id.*[14] One study suggested that the negative reactions of teenagers to an abortion (primarily depression) are generally mild.[15] Indeed, for all women, including teenagers, a frequent reaction to having an abortion is relief. *Id.* at 195.

After examining the available data, the Panel concluded that existing research simply does not support the assumption that minors are especially likely to experience adverse psychological reactions to an abortion. *Id.* at 277 ("On the basis of existing research . . . the contention that adolescents . . . are especially vulnerable to serious psychological harm as a result of an abortion is not supported.") In particular, scientific research has not shown

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[14] At least some of the few studies which suggested that there may be measurable differences in the short-term emotional well-being of adult women and adolescents following an abortion did not control for other potentially explanatory variables, such as the timing of the procedure. *Id.* at 244. Other factors, which may contribute to the slight differences in effect include gestational age, delay and social support. *Id.* at 196.

These studies cast serious doubt on the assumption articulated in *H.L. v. Matheson*, that "[t]he medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature." 450 U.S. at 411. Significantly, the studies upon which the *Matheson* court relied, *id.* at n.20, pre-date those examined by the Panel by at least a decade.

[15] *Citing* Adler & Dolcini, *Psychological Issues In Abortion for Adolescents* in *Adolescent Abortion: Psychological and Legal Issues* (G. Melton ed. 1986).

that mandated parental involvement helps adolescents cope with their decision to have an abortion. *Id.*[16] Similarly, the Panel found that the concern that adolescents are unlikely or unable to make well-reasoned conclusions lacks empirical support. *Id.* Given the absence of evidence to support or refute the belief that adolescents lack the cognitive capacity to make rational decisions about pregnancy termination, *id.* at 9, the Panel concluded that there is no scientific basis for restricting the availability of abortion on the basis of age. *Id.*

What the evidence does show is that confidentiality is a factor in a minor's choice of abortion providers. *Id.* at 279. ("Factors of cost and confidentiality lead most teenagers to clinics for [abortion] services."). The need to protect the confidentiality of an adolescent's decision to seek health care services relating to sexual activity has been widely recognized. At the time *Risking the Future* was written, 29 other states and the District of Columbia specifically allowed minors to give their own consent for family planning services. *Id.* at 157. The same sensitivity to the privacy interests of minors causes the vast majority of contraceptive providers to provide services to adolescents, particularly to teenagers over 15, without the

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[16] Since the Panel completed its work, more recent studies have been conducted, the results of which appear to be consistent with the findings of the Panel. *See, e.g.*, Brief for *Amici Curiae* American Psychological Association, et al., filed September 1, 1989, *citing* Ambuel, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion: An Empirical Study and Quantitative Model of Social Policy (1989) (Dissertation Abstracts Int'l); Ambuel & Rappaport, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion (1989) (Paper presented at American Psychological Association Convention); APA Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion, Psychological and Legal Issues*, 42 Am. Psychologist 73 (1987). Neither these *amici* as individuals, nor the Panel as a group, have independently reviewed these subsequent studies.

minor's parents' consent.[17] *Id.* at 155-56. Indeed, the Minnesota legislature has expressly relieved minors of the need to obtain parental or other adult consent "for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse." Minn. Stat. § 144.343 (1988).

The Panel recognized that the preservation of confidentiality is important to adolescents seeking assistance with respect to choices concerning their sexual behavior. *See, e.g., Risking the Future* at 8, 169, 170. It stressed the importance of privacy in every aspect of adolescent decision-making related to their sexual activity, emphasizing that "the girl or woman should be treated with the same dignity, *confidentiality*, kindness, and excellence of health care that are due any patient." *Id.* at 9 (emphasis added). *See also id.* at 278.

B. The Counseling Considerations

Both Ohio and Minnesota emphasize a need to protect teenagers from making an uninformed decision to terminate a pregnancy. *See, e.g.*, Minn. Br. at 32; Ohio Br. at 13 ("state's interest [is] in protecting a minor from the

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[17] Only one percent of Planned Parenthood affiliates, 10 percent of public health departments and other providers and 19 percent of hospitals required parental consent or notification. *Id.* at 155. More agencies require parental consent or notification for teenagers under 15 years of age. The figure for private physicians is lower: 59 percent of a national sample of physicians (including obstetrician-gynecologists, general practitioners and pediatricians) were willing to provide services to unmarried minors without parental consent. *Risking the Future* at 156-57. Physicians were less likely to serve minors without requiring parental consent in states which had not enacted legislation permitting minors to provide their own consent. *Id.* at 157. *Citing* Orr, *Private Physicians and the Provision of Contraceptives to Adolescents*, 16 Fam. Plan. Persp. 83 (1984).

long range consequences of an ill-advised abortion decision"). Relying heavily on Justice Stewart's comment in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 91 (1976) (concurring opinion), that "[i]t seems unlikely that [a teenage girl] will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place,"[18] both states suggest that parental notification helps ensure that a pregnant teenager has been adequately counseled prior to the abortion procedure. *See* Minn. Br. at 35; Ohio Br. at 27 (unlikely that minor will obtain adequate counsel from clinic).

The Panel's research does not support the assumption that non-parental counseling, particularly that of abortion providers, will necessarily be inadequate. The Panel found abortion clinics typically provide extensive counseling:

> All clinics make abortion counseling available on request; such counseling generally consists of describing the procedure and explaining its risks, obtaining informed consent, and confirming that it was the patient's own decision to have the procedure. [One researcher] reports that 90 percent of clinics routinely counsel all first-abortion patients; 88 percent of clinics provide decision counseling to help a young woman explore the various factors that are involved in making an informed decision about the termination of her pregnancy. Nonprofit clinics appear to place greater emphasis on counseling than for-profit facilities. As a matter of policy, 68 percent of clinics provide a pregnancy test before per-

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[18] Justice Stewart's sweeping conclusion is based on an excerpt from the record in *Bellotti v. Baird*, 428 U.S. 132 (1976), describing the counseling procedures in one abortion clinic. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. at 91 n.2. The empirical evidence suggests that the procedures described in *Bellotti* may not be representative of the counseling generally provided to pregnant minors.

forming an abortion, even when a test has been provided elsewhere. In addition, 93 percent routinely provide a post-abortion clinic visit.

Risking the Future at 191-92. "Adherence to principles of voluntarism and informed consent" requires family planning/abortion clinics to engage in comprehensive counseling, embracing "an account of the possible risks, benefits, and consequences of maternity and abortion, the available alternatives, including adoption, and the resources available for needed care." *Id.* at 174. Thus, the evidence compiled by the Panel does not support the presumption that non-parental counseling available to minors seeking to terminate an unwanted pregnancy is inadequate.

IV. PARENTAL NOTIFICATION REQUIREMENTS IMPOSE SUBSTANTIAL, UNJUSTIFIED BURDENS ON PREGNANT MINORS

As discussed above, in the opinion of these *amici*, the relevant scientific literature does not provide support for the proposition that parental notification or consent requirements actually foster familial communication, are necessary to reduce the likelihood of adverse psychological consequences to pregnant minors or contribute substantially to the minor's ability to make an informed decision about abortion. There is, however, one measurable effect of consent or notification provisions—delay and increased burden for the pregnant minor who seeks to obtain an abortion. *Id.* at 194.

A. Notification Requirements Result In Delays Which May Lead To Increased Health Risks

Where performed early in a pregnancy, abortion is a relatively safe procedure. Little risk of medical complications attaches to abortions performed by qualified professionals in the first trimester of pregnancy. *Id.* at 278. The health risks associated with early, legal abortions are

no greater for adolescents than for adults and generally appear to be lower. *Id.* at 125, 278.[19]

Delays in seeking advice about pregnancy termination or in obtaining an abortion can have adverse consequences, however. *Id.* at 194, 277. For instance, in *Hodgson v. Minnesota*, 648 F. Supp. 756, 765 (D. Minn. 1986), the Court found as a matter of fact that "[e]ven delays of less than one week may push a woman into the second trimester. Second trimester procedures entail significantly greater costs, inconvenience, and risk." 648 F. Supp. at 765.

Ironically, the delays associated with notification or consent requirements have an especially devastating effect on the very class of individuals that such procedures are intended to protect. As a group, teenagers are far less likely than older women to obtain abortions during the first trimester of their pregnancies. *Risking the Future* at 114. The younger the pregnant minor, the more likely she is to delay. According to one source, 34 percent of abortions to girls age 15 and younger are performed during the first eight weeks of gestation, compared with 41 percent of abortions among girls ages 15-19 and 51 percent of those among women ages 20-24. *Id.*[20] The delay has been attributed to the inability of teenagers, particularly younger teenagers, to recognize the signs of pregnancy or to distinguish them from normal menstrual irregularities. Teenagers also tend to deny that they are pregnant. *Id.*

Whatever the reason for the initial delay, statutorily imposed parental notification requirements appear to exacerbate a troublesome situation by increasing the like-

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[19] By contrast, the health risks of pregnancy and child birth are substantially higher for very young mothers than for adult women. *See generally id.* at 123-125.

[20] *Citing* Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981).

lihood that a pregnant teenager will delay obtaining an abortion. *Id.* at 194, 278. The requirements (or the perception of such requirements) are thought to inhibit some teenagers from seeking and obtaining abortions. *Id.* at 114. In addition, the statutory schemes typically impose waiting periods after parental notification has been accomplished. For instance, the statute enacted by the Minnesota legislature requires that both parents be given forty-eight hours written notice, with notice commencing at the time of delivery or on the next day, if notice is mailed. Minn. Stat. § 144.343. The trial court found that this procedure delayed the minor's abortion by at least forty-eight hours or more commonly seventy-two hours. *Hodgson v. State of Minnesota*, 648 F. Supp. 765, (D. Minn. 1986). The Ohio legislation requires that notification be provided to parents at least twenty-four hours prior to the abortion. Ohio Rev. Code Ann. § 2919.12(B)(1)(a)(i) (1989).

Moreover, as discussed above, many teenagers who do not voluntarily consult with their parents choose to use a judicial bypass proceeding rather than to comply with the notification provision. *Risking the Future* at 192. Judicial bypass proceedings allow a minor to establish that she is mature enough to make the decision without consulting her parents or to establish that parental consultation would not serve her best interests.[21] Minors who avail themselves of the judicial bypass alternative to parental notification are often found to be mature. *Id.* at 195. For those minors deemed immature, abortions are almost always found to be in their best interest. *Id.*[22]

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[21] To serve the best interests of minors, the proceeding should be expeditious, confidential and accessible.

[22] In Massachusetts, for example, between April 1981, when the consent statute took effect, and February 1983, about 1,300 minors sought an abortion through the judicial bypass procedure. In 90 percent of the cases the minor was judged to be mature; in the remaining cases, all but five requests for abortions were approved, according to the best interest standard. In three of the cases denied, the trial court's decision was overturned on appeal; in one case the judge invited the minor to seek approval from another judge, who granted the petition; and in the last case the minor decided to go to a neighboring state for an abortion (Mnookin, 1985). Similar findings have been reported in Minnesota (Donovan, 1983).
Risking the Future at 195.

A judicial bypass proceeding may require the minor to travel to another jurisdiction and wait for some period prior to obtaining access to the courts. *Id. See Hodgson v. Minnesota*, 648 F. Supp. at 763 (initial stages of proceeding may take a week or more; minor may need to travel to another jurisdiction). In the case of the Ohio proceeding, delays of twenty-two days are likely. *Akron Center for Reproductive Health v. Slaby, et al.*, 854 F.2d 852, 867 (6th Cir. 1988). Delays of this magnitude, especially when combined with some pregnant teenagers' delays in recognizing or taking decisive action when confronted with an unwanted pregnancy, could result in postponement of the abortion until the second trimester.

B. The Delay Caused By Parental Notification Statutes Disproportionately Burdens Minors Because Of Their Limited Access To Abortion Facilities

Teenagers generally have less access to abortion providers than do adult women. *Risking the Future* at 114.[23] Geographical constraints as well as costs hinder minors seeking abortion services. *Id.*[24] *Hodgson v. Minnesota, supra*, 648 F. Supp. at 761.

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[23] *Citing* the Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981).

[24] The district court in *Hodgson* found that 94% of the counties in Minnesota had no readily available abortion providers and that virtually all of the abortion providers in Minnesota were located in Duluth or Minneapolis-St. Paul. 648 F. Supp. at 761.

Where the delay imposed by parental notification requirements results in postponement until and within the second trimester, access to abortion services becomes even more limited. One study reviewed in *Risking the Future* found that while seventy-two percent of abortion providers surveyed will perform an abortion at ten weeks, only thirty-two percent will perform one at thirteen weeks, twenty-one percent at fifteen weeks and only five percent at twenty-one weeks. Eighty-two percent of abortion providers do not perform abortions after the first trimester. *Risking the Future* at 191. Given many minors' already limited access to abortion services, any delay that causes postponement until the second trimester could prevent the minor from exercising her right to obtain an abortion.

Second trimester abortions also are substantially more expensive than first trimester abortions.[25] *Id.* at 193. *See also Hodgson v. Minnesota, supra*, 648 F. Supp. at 761. The increased cost of a second-trimester abortion may prove to be an insurmountable barrier for a pregnant minor. *See Risking the Future* at 114 (geographical distances and costs limit teenagers' access to abortion, especially school-age girls and those from poor families).

In sum, it is the conclusion of these *amici* that parental notification requirements impose substantial and unwarranted burdens on pregnant adolescents by causing delay and postponement of the minor's abortion. These delays not only result in increased health risks but may create insurmountable barriers due to the decreased availability of abortions after the first trimester.

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[25] In 1981, hospital charges for abortions averaged $735, as opposed to $227-$230 in 1983 for non-hospital facilities. *Risking the Future* at 193.

CONCLUSION

Amici urge the Court to assess the claims of the parties in light of the findings set forth in *Risking the Future*. Specifically, *amici* believe that the scientific studies examined in *Risking the Future* do not support the claim that minors present an increased risk of psychological trauma or adverse medical consequences from abortions. The studies suggest to these *amici* that the statutes will not contribute to constructive intra-family communication. Nor is the available scientific literature consistent with claims that any delay that results from the restrictions will be insignificant. *See* Minn. Br. at 17; Ohio Br. at 37. To the contrary, it appears more likely that the delays in these notification proceedings will result in a higher degree of risk to the health of pregnant adolescents who ultimately obtain an abortion. To these *amici*, this burden of increased risk appears to outweigh any benefit to be derived from parental notification provisions.

Respectfully submitted,

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Dated: October 14, 1989

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APPENDIX

APPENDIX

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AMICUS CURIAE

BRIEF

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Nos. 88-805 and 88-1309

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit;

THE STATE OF MINNESOTA, *et al.*,

Cross Petitioners,

v.

JANET HODGSON, M.D., *et al.*,

Cross Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, THE AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN MEDICAL WOMEN'S ASSOCIATION, THE AMERICAN NURSES' ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE NURSES' ASSOCIATION OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AND THE SOCIETY FOR ADOLESCENT MEDICINE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES IN 88-805 AND IN SUPPORT OF CROSS RESPONDENTS IN 88-1309

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October 13, 1989

QUESTION PRESENTED

Amici curiae will address the following question:

Whether a state can burden a minor's constitutional right to decide whether to terminate her pregnancy by requiring in every case that one or both parents be notified of her decision without providing an effective, confidential and expeditious alternative procedure that does not require parental notification.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICI CURIAE*	2
MEDICAL BACKGROUND	4
A. The Pregnancy And Abortion Rates Among Adolescents Are Significant	4
B. Pregnancy Poses Greater Health Risks To The Woman Than Abortion	5
C. Adolescent Pregnancy Poses Particular Medical Risks, Which Are Due Largely To Delay In Seeking Health Care	7
D. Proper Treatment And Counseling Of Adolescents Requires Individualized Consideration Of Their Special Needs And Developmental Characteristics	10
SUMMARY OF ARGUMENT	12
ARGUMENT	15
I. MANDATORY PARENTAL NOTIFICATION IMPOSES A CONSTITUTIONALLY SIGNFICANT BURDEN ON A MINOR WOMAN'S RIGHT TO DECIDE WHETHER TO TERMINATE HER PREGNANCY AND ACCORDINGLY THE STATE MUST PROVIDE AN EXPEDITIOUS AND CONFIDENTIAL ALTERNATIVE TO MANDATORY PARENTAL NOTIFICATION	15
A. Mandatory Parental Notification Imposes A Constitutionally Significant Burden On A Minor Woman's Right To Decide Whether To Terminate Her Pregnancy	18

TABLE OF CONTENTS—Continued

Page

B. Mandatory Parental Notification Required In All Cases Is Not Tailored To The States' Interests In Protecting The Adolescent's Health Or In Promoting Family Integrity.... 21

C. In Order To Serve Their Interests, As Required By The Constitution, Both Ohio and Minnesota Are Obliged To Provide Some Opportunity For A Minor To By-Pass Having To Provide Notice To Either Or Both Parents, Respectively..... 27

CONCLUSION..... 29

TABLE OF AUTHORITIES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-805

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit;

No. 88-1309

THE STATE OF MINNESOTA, *et al.*,

Cross Petitioners,

v.

JANET HODGSON, M.D., *et al.*,

Cross Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, THE AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN MEDICAL WOMEN'S ASSOCIATION, THE AMERICAN NURSES' ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE NURSES' ASSOCIATION OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AND THE SOCIETY FOR ADOLESCENT MEDICINE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES IN 88-805 AND IN SUPPORT OF CROSS RESPONDENTS IN 88-1309

INTEREST OF *AMICI CURIAE*

Amici curiae are eight major organizations of health care professionals. *Amici* share an abiding dedication to promote the public welfare through the maintenance of the highest professional standards and the provision of quality health care. *Amici's* interest is not in debating the philosophical, ethical, moral or religious issues surrounding abortion, but rather in protecting the fundamental right of every individual to make health care treatment decisions free of state interference unless the state has a compelling justification for the restrictions it imposes and the state acts with particular sensitivity in promoting that interest.

Amicus American College of Obstetricians and Gynecologists ("ACOG") is a private, voluntary, nonprofit organization of physicians who specialize in obstetric and gynecologic care. ACOG is the leading group of professionals providing health care to women; its 28,000 members represent approximately 90 percent of all obstetricians and gynecologists practicing in the United States.

Amicus American Academy of Child and Adolescent Psychiatry ("AACAP") is a national professional organization of over 4,200 child and adolescent psychiatrists, who engage in research, prevention, diagnosis and treatment of developmental and psychiatric disorders in children, adolescents and families.

Amicus American Academy of Pediatrics ("AAP") is a nonprofit association of approximately 30,000 physicians certified in the specialized care of infants, children and adolescents. The AAP's principal purpose is to ensure the attainment by all children of their full potential for physical, emotional and social health. While the AAP's members hold widely divergent views on the desirability of abortion, they share an interest in assuring that state laws regulating abortion not impose unjustified and unnecessary burdens which increase risks to the health or well-being of pregnant adolescents.

Amicus American Medical Women's Association, Inc. ("AMWA") is a nonprofit organization of 12,000 women physicians and medical students. One of AMWA's primary missions is to promote quality health care for women. AMWA strongly opposes laws which adversely affect the health of women, or impose constraints on the right of the pregnant patient, in consultation with her physician, to make a personal and medically informed decision whether or not to continue a pregnancy.

Amicus American Nurses' Association ("ANA") is an association of registered nurses that is dedicated to the advancement of the goals and interests of registered nurses and of the nursing profession generally. The ANA is comprised of 53 member organizations which represent the nation's two million registered nurses. In serving clients of all ages, including adolescents, registered nurses share full information and promote the client's confidentiality.

Amicus American Psychiatric Association ("APA") is the nation's largest professional association specializing in psychiatry, with a membership exceeding 30,000 physicians. APA's purposes include promoting the welfare of patients who require psychiatric services.

Amicus Nurses' Association of the American College of Obstetricians and Gynecologists ("NAACOG"), is a 23,000 member professional organization for nurses who provide health care for women and infants. NAACOG's purpose is to establish relevant nursing standards and to assist its members in supplying the highest quality nursing care to their clients.

Amicus The Society for Adolescent Medicine, is a multidisciplinary association of approximately 1,000 health care professionals. Its purpose is to promote the development, synthesis and dissemination of scientific and scholarly knowledge unique to the development and health care needs of adolescents.

The statutory schemes at issue in these cases, which require notification of one or both parents before a phy-

sician is authorized to perform an abortion on a minor, raise disturbing questions about the provision of health care services to adolescents. In particular, the breach of confidentiality with an adolescent patient that is mandated by these statutes can lead to a significant increase in medical risk for the adolescent by causing her to delay or even to decline to seek care. Accordingly, *amici*, who are the primary providers of health care to young women, wish to present their views concerning the important issues raised in this appeal and cross petition.[1]

MEDICAL BACKGROUND

A. The Pregnancy And Abortion Rates Among Adolescents Are Significant.

Of the approximately 10 million adolescent women between 15 and 19 in the United States, at least 40% are sexually active and over 1 million have become pregnant each year since 1973.[2] In 1985, the most recent year for which complete data are available, the average daily rate of pregnancies was 2,825.[3] Four out of every ten young women will become pregnant at least once in their teens.[4]

National trends show an increase in adolescent pregnancy rates from 1972 to 1982, especially among the youngest adolescents. During that period, the rate of pregnancy among women 15 to 17 years old increased by 12% and the rate for adolescents under age 15 in-

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[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

[2] Henshaw & Van Vort, *Patterns and Trends in Teenage Abortion and Pregnancy*, in Alan Guttmacher Institute, Teenage Pregnancy in the United States: The Scope of the Problem and State Responses 12 (1989); National Academy of Sciences, *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing*, Vol. 1, 73 (C. Hayes ed. 1987).

[3] Almost 31,000 of these pregnancies were among teens under age 15. *Henshaw & Van Vort* at 12, 20.

[4] *National Academy of Sciences* at 51.

creased by 20%.[5] Since 1982, these pregnancy rates have remained relatively stable.[6]

Approximately 40% of pregnant adolescents each year terminate their pregnancies by an induced abortion.[7] In 1985, 416,170 adolescents terminated their pregnancies; 16,970 of these minors were under age 15.[8] Adolescents obtained 26% of all abortions in 1985. Although younger adolescents are less likely to become pregnant, when they do, they are somewhat more likely than older adolescents to obtain an abortion. Henshaw & Van Vort, *Patterns and Trends in Teenage Abortion and Pregnancy*, in Alan Guttmacher Institute, Teenage Pregnancy in the United States: The Scope of the Problem and State Responses 11-12 (1989).

B. Pregnancy Poses Greater Health Risks To The Woman Than Abortion.

Induced abortion is one of the most common and safest surgical procedures in the United States.[9] The overall risk of dying from abortion is seven times less than the overall risk of dying from childbirth. Greydanus & Railsback, *Abortion in Adolescence*, 1 Sem. Adol. Med. 213, 214 (1985); Cates, Schulz & Grimes, *The Risks Associated With Teenage Abortion*, 309 New Eng. J. Med. 621, 623 (1983). In 1981, the risk of dying from an abortion was 0.5 per 100,000 procedures,[10] while the risk

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[5] *Id.* at 16.

[6] *Henshaw & Van Vort* at 12. Birth and abortion rates also have not greatly changed since 1982. *Id.*

[7] *National Academy of Sciences* at 58.

[8] *Henshaw & Van Vort* at 10.

[9] Other common surgical procedures pose much greater risks of death than abortion: a tonsillectomy has two times the risk and an appendectomy carries 100 times the risk of death. W. Hern, *Abortion Practice* 23-24 (1984).

[10] Binkin, *Trends in Induced Legal Abortion Morbidity & Mortality*, 13 Clin. Obstet. Gynec. 83, 85 (1986); *see also* LeBolt, Grimes & Cates, *Mortality From Abortion and Childbirth*, 248 J.A.M.A. 188, 189 (1982).

of dying in childbirth was 8.5 per 100,000 live births.[11] A recent study found no deaths among 170,000 abortions performed within the first 14 weeks of pregnancy.[12]

Nonfatal adverse health effects also occur more often in childbirth than in abortion.[13] Pregnancy presents risks because it not only causes new complications but also aggravates existing conditions.[14] In fact, appropriate treatment for some preexisting illnesses may be termination of the pregnancy. Hunter, *Time Limits on Abortion*, in Reproductive Laws for the 1990s 133 (S. Cohen & N. Taub eds. 1989).

While abortion may involve adverse health effects, they are less frequent and less severe than those of pregnancy and childbirth. Common effects from abortion are pain, headache and nausea. Minor complications, such as infections, occur about 12% of the time, and about 0.4% of women suffer a major complication, such as hemor-

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[11] U.S. Dep't of Health and Human Services, 2A *Vital Statistics of the United States 1981* 64.

[12] Hakim-Elahi & Tovell, *Complications of First-Trimester Abortion: A Report of 170,000 Cases*, in The American College of Obstetricians and Gynecologists, Abstracts of Current Clinical and Basic Investigation 20, 20 (1989).

[13] While 63% of women experience medical complications in pregnancy, Placek & Taffel, *Recent Patterns in Cesarean Delivery in the United States*, 15 Obstet. Gynec. Clin. N.A. 607, 612, 615 (1988), approximately 12% of abortions result in a medical complication. Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in Abortion and Sterilization: Medical and Social Aspects 159 (J. Hodgson ed. 1981). *See also* U.S. Dep't of Health and Human Services, Centers for Disease Control, *Induced Terminations of Pregnancy: Reporting States, 1985 and 1986*, 37 Monthly Vital Statistics Rep. 7 (1989) (3.3 complications per 1,000 abortions).

[14] For example, pregnancy may increase the risk of death up to 50% for a woman suffering from a congenital heart disease. D. Danforth & J. Scott, *Obstetrics & Gynecology* 494-97 (5th ed. 1986); *Abortion, Medicine & the Law* 251 (J. Butler & D. Walbert 3d ed. 1986).

rhage severe enough to require a blood transfusion.[15] A recent study of first-trimester abortions reported a total complication rate of less than one percent.[16] Several factors affect the risk of complications from abortion, including the gestational age of the fetus and the woman's age. Buehler, Schulz, Grimes & Hogue, *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. 14, 19 (1985).

C. Adolescent Pregnancy Poses Particular Medical Risks, Which are Due Largely To Delay In Seeking Health Care.

Pregnancy poses unique, significant risks to the adolescent female compared to the adult woman. Although the rates of mortality and morbidity from abortion are generally lower for adolescents than for older pregnant women,[17] the maternal mortality rate during childbirth is higher for adolescents than older women.[18] Adolescents

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[15] Buehler, Schulz, Grimes & Hogue, *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. 14, 16 (1985); *Cates & Grimes* at 159-60.

[16] *Hakim-Elahi & Tovell* at 20. *See also* Grimes, *Surgical Management of Abortion*, in Te Linde's Operative Gynecology 533 (R. Mattingly & J. Thompson eds. 1985) (fewer than two serious complications per 1,000 abortions performed by suction curettage method).

[17] Stephenson, *Pregnancy Testing and Counseling*, 36 Ped. Clin. N.A. 681, 693 (1989); Greydanus & Railsback, *Abortion in Adolescence*, 1 Sem. Adol. Med. 213, 214 (1985); Cates, Schulz & Grimes, *The Risks Associated With Teenage Abortion*, 309 New Eng. J. Med. 621, 622-23 (1983). Adolescents under 15, however, may face an increased risk of cervical injury in a suction curettage abortion. *Id.* at 622.

[18] Lee & Corpuz, *Teenage Pregnancy: Trend and Impact on Rates of Low Birth Weight and Fetal, Maternal, and Neonatal Mortality in the United States*, 15 Clin. Perinat. 929, 935-936 (1988); Sacker & Neuhoff, *Medical and Psychosocial Risk Factors in the Pregnant Adolescent*, in Pregnancy in Adolescence: Needs, Problems and Management 107, 127 (I. Stuart & C. Wells eds. 1982).

who do not terminate their pregnancies are 200% more likely to die in childbirth than women in their twenties [19] and adolescents under the age of 15 face the highest risks of childbirth. Strikingly, their risk of death in childbirth in 1,000% greater than the risk to women in their twenties. See Sacker & Neuhoff, *Medical and Psychosocial Risk Factors in the Pregnant Adolescent*, in Pregnancy in Adolescence: Needs, Problems and Management 107, 127 (I. Stuart & C. Wells eds. 1982). See also Makinson, *Health Consequences of Teenage Fertility*, 17 Fam. Plann. Persp. 132, 134 (1985).

Certain health risks of pregnancy are highly correlated with youth. For example, adolescents are significantly more likely to have anemia and toxemia during pregnancy than older women.[20] The most frequent complication of adolescent pregnancy is pregnancy-induced hypertension, or preeclampsia.[21] When socioeconomic factors such as poverty, nonmarital status, low education and race are considered,[22] one age-related effect persists:

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[19] Miller & Field, *Adolescent Pregnancy: Critical Review for the Clinician*, 1 Sem. Adol. Med. 195, 199 (1985); Sacker & Neuhoff, *Medical and Psychosocial Risk Factors in the Pregnant Adolescent*, in Pregnancy in Adolescence: Needs, Problems and Management 107, 127 (I. Stuart & C. Wells eds. 1982). *But see Lee & Corpuz* at 938 (review of data from 1966 to 1980 suggests maternal mortality rates increase as maternal age increases).

[20] *Hunter* at 134.

[21] While 8%-10% of all pregnant women suffer from hypertension, C. Pauerstein, *Clinical Obstetrics* 645 (1987), studies show that up to 17% of adolescents have preeclampsia. Strobino, *The Health and Medical Consequences of Adolescent Sexuality and Pregnancy: A Review of the Literature*, in Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing, Vol. II, 112-13 (S. Hofferth & C. Hayes eds. 1987).

[22] Other complications seem to be dependent on socioeconomic status rather than age, except perhaps preeclampsia. American Academy of Pediatrics, Committee on Adolescence, *Adolescent Pregnancy*, 83 Pediatrics 132, 133 (1989). However, adolescents as a group tend to have more than one of these high-risk socio-

an increase in low birthweight infants.[23]

The adolescent's delay in seeking health care largely explains the disparity in risks facing the pregnant adolescent as compared to the adult woman.[24] Timely and complete prenatal care reduces the risks of maternal mortality, infant mortality and low birthweight.[25] While most pregnant women begin prenatal care in the first trimester, Brown, *Drawing Women into Prenatal Care*, 21 Fam. Plann. Persp. 73, 74 (1989); see also Institute of Medicine, *Prenatal Care: Reaching Mothers, Reaching Infants* 29 (S. Brown ed. 1989), adolescents consistently delay seeking care until relatively late in the pregnancy. See *Brown* at 74; Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 Am. Psych. 79, 80 (1987).

The tendency of adolescents to delay seeking health care when they become pregnant obviously affects when

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economic factors. Scholl, Miller, Salmon, Cofsky & Shearer, *Prenatal Care Adequacy and the Outcome of Adolescent Pregnancy: Effects on Weight Gain, Preterm Delivery and Birth Weight*, 69 Obstet. Gynec. 312, 312 (1987).

[23] Low birth weight is highly correlated to infant death and disease. Davis, *Adolescent Pregnancy and Infant Mortality: Isolating the Effects of Race*, 23 Adolescence 899, 901-902 (1988). Young maternal age is also highly associated with premature birth, a major cause of low birth weight. Ryan, *Giving Birth in America, 1988*, 20 Fam. Plann. Persp. 298, 299 (1988).

[24] One reason for the delay is that pregnancy symptoms in the adolescent may not be readily apparent due to irregular menses in adolescents. AAP, Comm. on Adolescence, *Counseling the Adolescent About Pregnancy Options*, 83 Pediatrics 135, 135 (1989); Brown, *Drawing Women Into Prenatal Care*, 21 Fam. Plann. Persp. 73, 75-76 (1989).

[25] Hediger, Scholl, Belsky, Ances & Salmon, *Patterns of Weight Gain in Adolescent Pregnancy: Effects On Birth Weight and Preterm Delivery*, 74 Obstet. Gynec. 6, 9 (1989); Institute of Medicine, *Prenatal Care: Reaching Mothers, Reaching Infants* 18 (S. Brown ed. 1989); AAP, *Adolescent Pregnancy*, at 133; Slap & Schwartz, *Risk Factors for Low Birth Weight to Adolescent Mothers*, 10 J. Adol. Health Care 267, 271-73 (1989); *Davis* at 901; *Pediatrics* 100 (A. Rudolph 18th ed. 1987).

pregnant adolescents typically seek an abortion. Adolescents are twice as likely as other pregnant women to obtain an abortion in the second trimester. U.S. Dep't of Health and Human Services, Centers for Disease Control, *Abortion Surveillance 1982-83*, 36 M.M.W.R. 39 (Feb. 1987). This increased likelihood of adolescents to delay obtaining an abortion increases the risks of the procedure.[26] The risk of mortality from abortion increases 50% for each week after the eighth week of pregnancy.[27]

D. Proper Treatment And Counseling Of Adolescents Requires Individualized Consideration Of Their Special Needs And Developmental Characteristics.

A vital concern of the adolescent who requires medical diagnosis, counseling and treatment for her pregnancy is the confidentiality of her relationship with a health care provider. Confidentiality is important in all relationships between patients and health care professionals, because successful treatment contemplates a relationship that facilitates communication and the flow of accurate information. In the optimal relationship, the health care provider recognizes the patient's rights of confidentiality, respect, dignity and privacy. The American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* 89 (7th ed. 1989). The maintenance of confidentiality has long been recognized as vital to all such relationships, but it is particularly important for the adolescent patient.

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[26] *Greydanus & Railsback* at 216; Cates, *Abortions for Teenagers*, in Abortion and Sterilization: Medical and Social Aspects 140, 144 (J. Hodgson ed. 1981).

[27] *Cates & Grimes*, at 155, 171. Compared to the risk of death from abortion at eight weeks, the risk at 9-10 weeks is 2.6 times greater, at 11-12 weeks is 4.2 times greater, and at 13-15 weeks is 9.6 times greater. Grimes, *Surgical Management of Abortion* at 537. *See also* Cates, Schulz, Grimes & Tyler, *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plann. Persp. 266, 267 (1977) (major complication rate for abortions increases 91% from the eighth to the twelfth week).

A consortium of professional health care organizations, including several of the *amici*, recently adopted a formal policy statement calling on all health care professionals to safeguard the confidentiality of the relationship with the adolescent patient.[28] This policy statement endorses efforts by health care providers to encourage adolescents to seek parental involvement where appropriate, but stresses the overall importance of confidentiality to assure health care treatment. One of the primary reasons cited by the statement for the need to assure the adolescent patient that her confidentiality will be maintained is the direct connection between an adolescent's willingness to seek health care and unqualified assurances of confidentiality.[29] The necessity of ensuring a confidential relationship between the health care provider and an adolescent patient is thus widely recognized within the community of health care professionals.[30]

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[28] *Confidentiality in Adolescent Health Care*, Joint Policy Statement, approved as policy by the American Academy of Family Physicians, *amicus* AAP, *amicus* ACOG, *amicus* NAACOG and the National Medical Association (1988) (reprinted as Appendix 1).

[29] *Id. See also, Brown* at 76 (adolescents typically cite fear of breach of confidentiality as a major reason for not seeking early prenatal care); Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 Am. Psych. 79, 80 (1987); Fisher, Marks, Trielier & Brody, *Are Adolescents Able and Willing To Pay the Fee for Confidential Health Care?*, 107 J. Pediat. 480, 482 (1985); Fost, *Parents as Decision Makers for Children*, 13 Primary Care 285, 290 (1986).

[30] *See Adolescent Medicine* 23-24 (A. Hofmann & D. Greydanus 2d ed. 1989); Croxton, Churchill & Fellin, *Counseling Minors Without Parental Consent*, 67 Child Welfare 3, 11 (1988); Anglin, *Interviewing Guidelines for the Clinical Evaluation of Adolescent Substance Abuse*, 34 Ped. Clin. N.A. 381, 394-95 (1987); Silber, *Ethical and Legal Issues in Adolescent Pregnancy*, 14 Clin. Perinat. 265, 269 (1987); Working Group of the Northern Health Region in Current Medical/Ethical Problems, *Consent to Treatment By Parents and Children*, 12 Child 5, 9 (1986); Cavanaugh, *Obtaining a Personal and Confidential History from Adolescents*, 7 J. Adol. Health Care 118, 119 (1986); Lovett & Wald, *Physician Attitudes Toward Confidential Care for Adolescents*, 106 J. Pediat. 517, 519, 521 (1985); Strasburger, Eisner, Tilson, Rigg & Kulig, *Teen-*

Proper treatment for the pregnant adolescent includes not only confidentiality but also sensitivity to the variations in adolescent development and maturity. Adolescent growth is a complex, rapid and uneven process; development varies according to age and individual circumstances.[31] As she matures, an adolescent's intellectual and emotional capacities change, and she acquires the capability to reason, solve problems rationally and understand the consequences of decisions.[32] Early adolescents aged 10 to 14 years usually lack sufficient cognitive, psychosocial and emotional maturity to understand and bear the responsibilty of pregnancy and childbirth; by contrast, older adolescents typically display the maturity to handle decisions concerning their pregnancy outcomes.[33] Within each age group, however, individual abilities vary, requiring treatment directed towards the individual patient's needs. *Pediatrics* at 46; Osofsky & Osofsky, *Teenage Pregnancy: Psychosocial Considerations*, 21 Clin. Obstet. Gynec. 1161, 1172 (1978); *Miller & Field* at 195.

SUMMARY OF ARGUMENT

These cases concern the tension between the right of a minor woman to decide, in consultation with her health care provider, whether to have an abortion and the state's interest in encouraging this decision to be made on an informed basis with the assistance and support of the minor's parents. In suggesting how this tension should be

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agers, Physicians, and the Law in New England, 6 J. Adol. Health Care 377, 380 (1985); *Miller & Field* at 204. The British Medical Association also endorses a policy of confidential treatment for adolescents. Harvard, *Medical Confidence*, 11 J. Med. Ethics 8, 9 (1985).

[31] McAnarney & Greydanus, *Adolescent Pregnancy and Abortion*, in Adolescent Medicine 403-404 (A. Hofmann & D. Greydanus 2d ed. 1989).

[32] *Miller & Field* at 203; Melton & Pliner, *Adolescent Abortion: A Psychological Analysis* in Adolescent Abortion 1 (G. Melton ed. 1986).

[33] *McAnarney & Greydanus* at 403-04.

resolved under the Constitution and the decisions of this Court, *amici* recognize that the state has a strong interest in promoting discussions between minors and their parents concerning any subject as important as health care. *Amici* routinely encourage minors to consult with their parents concerning all important health and life decisions and firmly believe that *voluntary* consultation with parents is highly beneficial to most adolescents. However, because *mandatory* parental notification places an extraordinary burden on many pregnant minors and that burden is not justified by the state's interests, this Court should hold that a state may not mandate parental involvement, whether by means of consent or by notification, without providing an effective, confidential and expeditious alternative procedure.

A. The constitutional right articulated by this Court in a line of cases following *Roe* v. *Wade*, 410 U.S. 113 (1973) (*"Roe"*), protects a woman's decision whether to terminate an unwanted pregnancy free from unwarranted interference by the state. This right extends to pregnant minors, as well as adults, because unwanted motherhood may be "exceptionally burdensome" for young women. *Bellotti* v. *Baird*, 443 U.S. 622, 642 (1979) (*"Bellotti II"*). Accordingly, this Court has recognized that despite the state's interest in furthering parental involvement in the raising of their children, the state may not constitutionally impose a parental *consent* requirement on a pregnant minor who seeks an abortion without providing her with an alternative procedure that eliminates the need to notify her parents. *Id.*

By comparison to a consent requirement, mandatory parental *notification* imposes somewhat different but nevertheless significant burdens on the minor's exercise of her rights, *viz.*, delaying or dissuading minors from seeking necessary medical care. This delay, in turn, increases the health risks to the pregnant minor, which this Court has recognized as a constitutionally significant burden. *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 450 (1983) (*"Akron I"*).

Thus, as this Court recognized in *Bellotti II*, parental notification, although not equivalent to consent, imposes a significant burden on a minor's abortion rights. 443 U.S. at 647. Moreover, a requirement, such as Minnesota's, to notify both parents, even where one parent is not and has never been involved in the raising of the pregnant minor, is extremely burdensome and poses special risks to the pregnant minor.

B. This Court has held that "[s]tate restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest . . . that is not present in the case of an adult,'" *Carey* v. *Population Services Int'l*, 431 U.S. 678, 693 (1977) (citations omitted), and that the state must provide the Court with "more than a bare assertion . . . that the burden is connected to such a policy." *Id.* at 696. Moreover, this Court has generally held that when a fundamental right is infringed, the state must carefully tailor its statute to its legitimate objectives. *Roe*, 410 U.S. at 165; *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476, 485 n.8 (1983). In an area as sensitive as teenage abortion, the state must not be permitted to apply absolute requirements; the state must make allowances for individual differences. When judged by this standard, both the Ohio and Minnesota mandatory parental notification schemes are invalid in the absence of an effective, confidential and expeditious procedure permitting the minor to bypass notification of one or both parents, because neither statute serves carefully to advance the state's legitimate interests in the health of the minor or in fostering family integrity.

ARGUMENT

I. MANDATORY PARENTAL NOTIFICATION IMPOSES A CONSTITUTIONALLY SIGNIFICANT BURDEN ON A MINOR WOMAN'S RIGHT TO DECIDE WHETHER TO TERMINATE HER PREGNANCY AND ACCORDINGLY THE STATE MUST PROVIDE AN EXPEDITIOUS AND CONFIDENTIAL ALTERNATIVE TO MANDATORY PARENTAL NOTIFICATION.

At their core, the two cases before the Court concern the basic tension between the right of a minor woman to decide, in consultation with her health care provider, whether to have an abortion and the State's interest in encouraging this decision to be made on an informed basis with the assistance and support of the minor's parents. Minnesota has chosen to resolve this delicate issue by requiring, under burden of criminal and civil sanction, that a physician notify *both* biological parents (whether or not the parents were ever married, had custody of the child or participated in the child's rearing in any way) that their minor daughter intends to have an abortion and then wait at least 48 hours after such notice before performing the abortion. Minn. Stat. Ann. §§ 144.343(1)-(7) (West 1988). Ohio has chosen to resolve this same problem by requiring, under burden of criminal and civil sanction, that the physician personally give actual notice to at least one parent and then wait at least 24 hours after notice before performing the abortion. Ohio Rev. Code Ann. §§ 2151.85, 2505.073 and 2919.12 (Anderson Supp. 1989). Both statutes contain provisions establishing a judicial by-pass procedure intended to permit a mature minor or minor whose best interests would not be served by notification to be relieved of the mandatory requirement. Nevertheless, both states have asked this Court to hold that they are not constitutionally obligated to maintain a confidential and expeditious procedure to bypass parental notification.

This Court has clearly established that a state cannot compel a pregnant minor to obtain parental *consent* for

an abortion without providing her an alternative procedure whereby she can obtain authorization for an abortion without notifying her parents. *Bellotti II*, 443 U.S. at 643. The alternative procedure must allow the minor to show:

> either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation, with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.

Id. at 643-44 (footnotes omitted). In addition, the alternative procedure, which can be administrative or judicial in nature,

> must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.

Id. at 644. Because the parental consent statute at issue in *Bellotti II* failed to comply with these requirements, the Court found the Massachusetts statute unconstitutional.

This Court did not in *Bellotti II*, and has not since, resolved the exact question posed by the present cases, namely, whether a State can impose the burdens of mandatory parental *notification* on a minor attempting to exercise her constitutional right to choose an abortion without providing an effective, expeditious and anonymous by-pass procedure that does not entail parental involvement.[34] Nevertheless, in *Bellotti II*, this Court explicitly

[34] In both *H.L.* v. *Matheson*, 450 U.S. 398 (1981), and *Bellotti II*, this Court's discussion of notice provisions was in the context of notice to parents of *immature* minors (*Matheson*, 450 U.S. at 411 ("[a]s applied to immature and dependent minors. . . ."); *Bellotti II*, 443 U.S. at 640 ("[a]s immature minors often lack the ability to make fully informed choices . . .")). Moreover, there was no allegation of injury to the immature minor from parental involvement. Thus, neither *Matheson* nor *Bellotti II* resolved the issue presented by the cross petition in *Hodgson* and appeal in *Akron II*, both of which involve statutes that apply to mature minors as

rejected the statutory scheme there because it did not permit "every minor [to] have the opportunity—if she so desires—to go directly to a court without first *consulting or notifying* her parents." *Id.* at 647 (emphasis added). The Court's holding and reasoning in *Bellotti II* reflect a recognition that mandatory parental involvement, whether in the form of consent, consultation or mere notice, "would impose an undue burden upon the exercise by minors of the right to seek an abortion." *Id.*

Obviously, there is a difference between a statute that gives one or more parents an absolute veto over the minor child's exercise of her constitutional rights and a statute that requires one or more parents to be notified. But the constitutional analysis does not turn on whether the state-imposed obstacle is absolute; that merely makes the case easier to decide. The analysis depends upon whether the statutory scheme imposes a sufficient burden on the exercise of the minor's right to require the state to come forward to justify the restrictions. See *Akron I*, 462 U.S. at 449-51; *Matheson*, 450 U.S. at 414 (Powell, J., concurring) (noting that majority did not decide whether notification requirement burdens minor's rights if notice is not in her best interests). In light of the very substantial burden imposed by a mandatory parental notification requirement, *Bellotti II*, 443 U.S. at 647, and the lack of sufficient justification for such a requirement as applied to a sizable class of mature minors and those for whom it would be in their best interests to have an abortion without notifying their parents, this Court should hold that an effective, confidential and expeditious alternative procedure is required whenever a state burdens a minor's constitutional right to choose an abortion by mandating parental involvement, whether that involvement takes the form of mandatory notification or mandatory consent.

well as immature dependent minors whose best interests would not be served by parental involvement. *See Matheson*, 450 U.S. at 414 (Powell, J., concurring).

A. Mandatory Parental Notification Imposes A Constitutionally Significant Burden On A Minor Woman's Right To Decide Whether To Terminate Her Pregnancy.

The most serious burden imposed by mandatory parental notification is the impact it has on adolescent health. This burden has two aspects: first, by requiring notification, the statutes deter adolescents from seeking health care and second, the notification requirements cause adolescents to delay seeking care which in turn increases the medical risks to them.

First, the statutes at issue in these cases both clearly abrogate the confidentiality that is at the core of the physician-patient relationship by requiring the physician to notify one (Ohio) or both (Minnesota) of the minor woman's parents of her intent to obtain an abortion. It is well documented that adolescents are particularly concerned with keeping information concerning their sexual/medical history confidential and that perceived threats to confidentiality are a primary factor in an adolescent's propensity to delay or even forgo seeking health care. See *supra* pp. 10-11. Noting that this issue of confidentiality is "a significant access barrier to health care," those in the medical community who primarily provide care to adolescents recently issued guidelines calling for health care professionals, *inter alia*, to accord adolescent patients the same confidentiality as that accorded to adult patients.[35]

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[35] *See* App., *infra*, 1a-2a. The actual operation of a mandatory parental involvement statute in Massachusetts demonstrates that the concern with erecting barriers to access to health care is more than hypothetical—when confronted with mandatory parental consent, one third of the minors seeking an abortion are traveling outside the state to obtain an abortion in a jurisdiction that does not require parental notice. Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397, 400 (1986). Similarly, the impact of the Minnesota statute has been to delay adolescents in obtaining abortions. *See* Hodg. App. 135a.

Most states have recognized the devastating impact on care that occurs when an adolescent patient's confidentiality is breached and have responded explicitly by exempting adolescents from parental consent *or even notification* when adolescents seek medical assistance for prenatal care, venereal disease or sexually transmitted diseases in general, and drug or alcohol abuse.[36] Minnesota and Ohio are among those states.[37] Minn. Stat. § 144.343 (1) (West 1988); Ohio Rev. Code Ann. §§ 3709.24.1, 3719.01.2 and 5122.04 (Anderson Supp. 1989).

Second, the experience of health care providers, the sound judgment of state legislators and the actual operation of parental notification statutes confirm that mandatory parental notification leads many minors significantly to delay obtaining care. The additional delay provoked by a mandatory parental notification statute can cause a significant increase in medical risk for many minors. Although abortion is a relatively low-risk medical procedure for the pregnant woman,[38] health risks increase with the gestational age at the time of the abortion. Mortality due to abortion, although quite low in comparison with other common medical procedures, increases approximately 20 percent for each week of gestation from 8 to 15 weeks and even more after 15 weeks.[39]

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[36] Hodg. Pet. Brf. App. A-8 to A-18 (listing states in each of these categories). For example, states permit adolescents to consent to confidential childbirth care, including delivery by cesarean section. These procedures pose greater health risks to adolescents than abortion. See *supra* pp. 5-8.

[37] The five-year experience with a two-parent notification requirement in Minnesota illustrates the directness of the correlation between breaches in confidentiality and delay in obtaining an abortion —the percentage of women under the age of 17 who obtained abortions in their second trimester was 18.4 percent in 1978; by 1983, after the statute had been in effect for several years, that figure had increased to 23 percent while the figures for Minnesota women 18 and older showed no such dramatic increase in late abortions. Hodg. App. 135a.

[38] *See supra* pp. 5-6.

[39] C. Tietze & S. Henshaw, *Induced Abortion: A World Review 1986* 109-10 (6th ed. 1986).

As discussed above, it is well-established that adolescents are more likely than adult women to postpone seeking all pregnancy related medical care, including abortions. See *supra* p. 9. Because minors delay seeking an abortion longer than adults, any additional delay will pose a greater risk to their health than would such a delay for adult women seeking an abortion. When added to the other factors that cause adolescents to delay seeking abortions, a mandatory parental notification requirement will push some minors into the second trimester before they receive an abortion.[40] If that occurs, the risk of medical complications increases substantially.[41] Moreover, if the minor ultimately decides not to have an abortion, mandatory parental notification will have delayed her in seeking appropriate prenatal care, causing increased health risks to her and to her baby. See *supra*, at 9.

Mandatory waiting periods, such as the 48-hour requirement in Minnesota and the 24-hour requirement in Ohio, exacerbate the delay. As a practical matter, mandatory waiting periods often result in the minor having to make a second trip to the health care facility with additional delays caused by scheduling.[42] If, as is often

[40] The district court specifically found that the effective delay caused by Minnesota's two-parent notification requirement when coupled with the 48-hour waiting period could reach one week or more. Hodg. App. 23a. Such a delay could, the court found, result in a woman having a second trimester abortion. *Id.*

[41] *C. Tietze & S. Henshaw* at 103-04, 110.

[42] Although in theory a minor can call ahead to the physician, who can then notify the parent or parents and schedule a single appointment for some time after the expiration of the mandatory waiting period, *see, e.g.*, Hodg. Brf. of Cross Pet. 40), many physicians are unwilling to notify the minor's parents that an abortion will be performed on their daughter in 24 or 48 hours, if the physician has never met the minor, examined her, confirmed her pregnancy or discussed alternatives with her. *See, e.g.*, AAP, Comm. on Adolescence, *Counseling the Adolescent About Pregnancy Options*, 83 Pediatrics 135, 136 (1989) ("information [about the existence of a pregnancy] should always be given in a personal and private setting, preferably not by telephone").

the case, the minor must make a second trip to the physician, there will be additional expense and delay. The additional delay, in turn, compounds the increased medical risk of a later abortion.[43]

B. Mandatory Parental Notification Required In All Cases Is Not Tailored To The States' Interests In Protecting The Adolescent's Health Or In Promoting Family Integrity.

The precise formula for reviewing the constitutionality of statutes that substantially burden a pregnant minor's abortion right has never been articulated by this Court, but it is clear that the state must "act with particular sensitivity when it legislates to foster parental involvement" in a minor's decision whether to terminate a pregnancy. *Bellotti II*, 443 U.S. at 642. Thus, the state must advance a "significant state interest" in the burdening regulation, *Carey* v. *Population Services Int'l*, 431 U.S. at 693 (plurality opinion), and the state must do more than simply assert that the statute advances the state's significant interest. *Id.* at 696.

Moreover, when a fundamental right is infringed, this Court has held that the State must carefully tailor its statute to its legitimate objectives. See *Roe*, 410 U.S. at 165; *Ashcroft*, 462 U.S. at 485 n.8, *Akron I*, 462 U.S. at 438. *Amici* submit that no different approach is warranted in dealing with minors, although they recognize that this Court has held that additional state interests exist in the context of minors. *Cf. Matheson*, 450 U.S. at 410-11. And even if a state need not "fine-tune" its statutes in this setting, it would be wholly inconsistent with the fact that the minor is exercising a fundamental right to permit the State to further its interests in ways that are unjustifiably overbroad. Because it is clear that

[43] There is also evidence that a mandatory waiting period itself creates additional stress and anxiety that further compounds the health risks of abortion. Lupfer & Silber, *How Patients View Mandatory Waiting Periods for Abortion*, 13 Fam. Plann. Persp. 75, 77 (1981).

the opportunity for an individualized determination is necessary to permit many minors to exercise their rights and to ensure that the State's interest in protecting their health is achieved, this Court should hold that a state must provide an effective, confidential and expeditious alternative to parental notification.

Minnesota and Ohio attempt to justify the significant burden they impose by arguing that their requirements serve several important state interests. However, even a cursory examination of the parental notification requirement demonstrates that for a significant number of minors, the statutes, if applied without exception, will fail to advance any purported state interest.

1. One of the primary justifications advanced by Minnesota and Ohio is to further parental involvement in raising their children.[44] However, for a significant number of minors, the requirement fails to promote the state's interest. First, studies have shown that a substantial number of adolescents voluntarily notify one or both parents in the absence of any statute and that among younger adolescents—those 15 and younger—over 75 percent voluntarily informed their parents.[45] Because the state's putative interest is in providing guidance to *immature* minors,[46] it is particularly significant that younger adolescents overwhelmingly choose to involve one or both parents voluntarily. For all those minors who voluntarily inform a parent, the statutory notice requirement serves only to delay effectuation of a decision that benefited from familial involvement.[47] And, as amply documented, the delay created by this statutory requirement entails an increased health risk to the minor.

[44] Mandatory notification is designed "to serve the state's substantial and legitimate interest in the family-based child-rearing process" (Hodg. Brf. of Cross Pet. 8); it assists in "promoting parental consultation" (Akron II Brf. of Appellant 24).

[45] Torres, Forrest & Eismann, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plann. Persp. 284, 287-90 (1980); Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 Am. J. Pub. Health 283, 284 (1982); Rosen, *Adolescent Pregnancy Decision-making: Are Parents Important?*, 15 Adolescence 44 (1980).

[46] *Bellotti II*, 443 U.S. at 640; *Matheson*, 450 U.S. at 411.

Second, in the absence of an effective by-pass procedure neither statute would provide any exception when notification reasonably can be expected to have disruptive and perhaps dangerous consequences. In most situations, it is helpful to involve parents when a minor is faced with any medical treatment decision, including whether or not to terminate a pregnancy. It is for that reason that several of the *amici* have issued a policy statement directing their members to use "every reasonable effort to encourage the adolescent to involve parents" in providing medical care and counseling. App., *infra*, 1a. However, in that same statement, the health care providers caution that "the health risks to the adolescents are so impelling that . . . deference to parental involvement should not stand in the way of needed health care." *Id.* at 2a.

This policy statement reflects the fact that there are circumstances, unfortunately too frequent, in which parental involvement will be harmful to the patient's health and not beneficial to family relationships. The initial parental reaction to a minor daughter's pregnancy frequently involves anger and can lead to a family crisis.[48] In families with a history of physical or sexual abuse, such an announcement may precipitate a violent reaction.[49] It is thus not surprising that a substantial

[47] In Minnesota, the court found that there was no increase in the proportion of minors who notified their parents because of the law (Hodg. Pet. App. 41a) and, moreover, some minors chose to utilize the by-pass procedure rather than tell both parents although they would have been willing to tell one parent. Hodg. Pet. App. 31a.

[48] Osofsky & Osofsky, *Teenage Pregnancy: Psychosocial Considerations*, 21 Clin. Obstet. Gynec. 1161, 1164-65 (1978).

[49] A recent government study has estimated that at least one million children and adolescents have been harmed by abuse or neglect. National Center on Child Abuse and Neglect, U.S. Dep't of

percentage of the minors who do not voluntarily inform their parents of their pregnancy and planned abortion indicate that their reluctance stems from fear of physical punishment or other extreme response.[50] Obviously, such responses do not promote the minor's health; they seriously jeopardize it. Moreover, even if the fear of a harsh response, in fact, proves incorrect, the fear and attempt to avoid notification can lead to delay in seeking medical care that in turn increases the health risks to the pregnant minor. See *supra* pp. 9-10. Finally, as discussed below at 26, notification to a non-custodial, long absent parent, as required under the Minnesota statute, may well result in familial discord and disruption of the custodial family, which is the antithesis of the family integrity contemplated by the legislature.

2. Many states, including Ohio and Minnesota, have argued that parental notification or consent serves an important state interest in protecting the minor woman's health by allowing one or both parents the opportunity to provide the physician with medical information of which the physician would otherwise be unaware and by ensuring that a parent is alert to the signs of potential medical complications from the procedure. Akron II Brf. of Appellant 46-47. Hodg. Brf. of Cross Pet. 34-35. Although the Court has postulated such an interest, *Matheson*, 450 U.S. at 411, in fact breaching a minor's confidentiality jeopardizes the state's interest in assuring the minor's health. Not only are parents frequently unaware

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Health and Human Services, *Study of National Incidence and Prevalence of Child Abuse and Neglect 1988* xx (1989).

[50] *Clary* at 284. *See also* Blum, Resnick & Stark, *The Impact of a Parental Notification Law on Adolescent Decision-Making*, 77 Am. J. Pub. Health 619, 620 (1987) (anticipated family conflict was chief reason adolescents chose not to inform parents of their pregnancy); Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Fam. Plann. Persp. 259, 262 (1983).

of important aspects of their minor children's medical history, particularly those related to sexual activity, drug and alcohol use,[51] but more importantly, there is a serious risk that by breaching the minor's confidentiality, the statute will operate to deprive health care providers of necessary medical information that only the minor knows if, as is well-documented, she is unwilling to be candid about her relevant medical history without an assurance of confidentiality from the health care provider.[52]

3. A mandatory, two-parent notification requirement, such as Minnesota's, is completely unjustified. As we have shown previously, the burdens imposed by a mandatory parental notification scheme are greatly increased by the addition in Minnesota of a requirement that *both* biological parents must be notified of their minor daughter's intent to obtain an abortion. Thus, even if the Ohio statute could be defended on the ground that the State's interests justify the burden imposed by a one-parent notification requirement, which it cannot, it is clear beyond doubt that Minnesota's two-parent requirement without exceptions is unconstitutional.

a. By imposing a requirement that the physician notify both biological parents before performing an abortion on a minor, Minnesota has treated abortion differently than any other medical procedure. In areas that do not deal with sexuality or substance abuse, states require, at most, a single parent's consent before performing medical procedures on a minor. This is true regardless of the immaturity of the minor or the dangerousness of the procedure.[53] Thus, in Minnesota, a physician could

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[51] *See* AAP, Comm. on Adolescence, *Role of the Pediatrician in Management of Sexually Transmitted Diseases in Children and Adolescents*, 79 Pediatrics 454, 454 (1987); *Rosen* at 44.

[52] Roemer, *Legislation on Contraception and Abortion for Adolescents*, 16 Fam. Plann. Persp. 241, 247 (1985) (access is fostered by assuring confidentiality of abortion services).

[53] Even the federal regulations governing the participation of children in medical research deem consent by one parent to be

face the anomalous situation that he could perform heart surgery on an infant with the consent of a single parent, but would be subjected to criminal and civil sanction if he performed an early first trimester abortion on a 17 year old with her mother's written consent. The obvious purpose of this scheme is to discourage an adolescent from exercising her constitutional right to have an abortion and the practical effect is to jeopardize the minor's health.

b. The Minnesota statute fails to make exceptions to the two-parent notification requirement in a number of circumstances where notification of the second parent could not possibly serve any state interest in fostering family communication, protecting the minor's health or in providing an immature minor with guidance in important decisionmaking. For example, the statute makes no exception for a long-absent biological parent, a parent who has indicated no interest or willingness to become involved in the care and rearing of the minor daughter, or even an abusive parent (except in the narrow circumstances where the minor is willing to report the physical or sexual abuse to officials who will begin formal investigation of the charges). In none of these cases can the statutory requirement of notifying *both* biological parents be said to serve any legitimate state interest.[54] In sum, the two-parent notification requirement of the Minnesota statute utterly fails to advance any legitimate state interests in a carefully tailored fashion.

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sufficient except where the research poses greater than minimal risk *and* the procedure offers no prospect of direct benefit to the child or is so experimental as to be classified as "not otherwise approvable." 45 C.F.R. §§ 46.406 and 46.407 (1988).

[54] This Court's decision in *Bellotti II* is not to the contrary. In that case, this Court concluded that the requirement of obtaining the consent of both parents did not constitutionally burden a minor's right to seek an abortion "[a]t least when the parents are together and the pregnant minor is living at home." *Bellotti II*, 443 U.S. at 649. However, the statute at issue in *Hodgson*, as drawn and as applied, clearly covers minors whose parents are not and have never been together in the same household with the minor.

C. In Order To Serve Their Interests, As Required By The Constitution, Both Ohio and Minnesota Are Obliged To Provide Some Opportunity For A Minor To By-Pass Having To Provide Notice To Either Or Both Parents, Respectively.

As this Court has recognized, despite the State's interest in encouraging familial communication about important life decisions by minors, the "need to preserve the constitutional right and the unique nature of the abortion decision . . . require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter." *Bellotti II*, 443 at 642. Because of the extraordinary burdens imposed by a parental notification requirement and the special developmental characteristics of adolescents, if required parental notice is permitted, the state must provide an effective alternative procedure that will both protect the minor's fundamental right to choose appropriate health care and accommodate the state's legitimate interests.[55]

For the purpose of determining the need for a by-pass procedure, it is significant that the parental notification requirements at issue in these cases apply to mature minors, as well as to immature minors.[56] This Court has recognized that a minor's maturity is of particular importance in the context of a state statute restricting a minor's abortion right. Thus, despite the general au-

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[55] As this Court noted in *Bellotti II*, the alternative procedure need not be judicial. 443 U.S. at 643 n. 22. In light of the serious deficiencies of some judicial by-pass procedures, *cf.* Hodg. Cert. Pet. App. 27a, 82a, 93a (findings of district court), it may well be that an administrative procedure would be more effective in reducing delay, trauma to the minor and risk to her health and well-being.

[56] The present cases thus involve a very different issue from that posed in *Matheson* where the minor class challenging the statute made no allegation based on maturity. *Matheson*, 450 U.S. at 412 n.22 (because the particular class was one of immature minors, the case does not require the Court to determine the circumstances in which a state must provide an alternative to parental notification); *id.* at 414 (Powell, J., concurring).

thority that is given to the state to "resort to objective, though inevitably arbitrary criteria such as age limits" when regulating the legal rights of minors, "the peculiar nature of the abortion decision *requires the opportunity for case-by-case evaluations of the maturity of pregnant minors.*" *Bellotti II*, 443 U.S. at 643-44 n.23 (emphasis added). In the absence of a by-pass procedure, neither of the parental notification schemes at issue in these cases would permit any such individualized evaluation of the pregnant minor's maturity.

There are considerable variations in the maturity of adolescents; a substantial number of older adolescents (those 16 and 17 years old) and even some younger adolescents are sufficiently mature to make reasoned, thoughtful and competent decisions about such medically and ethically complex subjects as whether or not to terminate a pregnancy. See *supra* p. 12. This is not to say that mature minors generally will not profit from involving their parents in a decision about abortion—most would and, in fact, most do. But the State's interest in protecting a minor from the consequences of a choice that is not informed and mature (*Bellotti II*, 443 U.S. at 635) would not be advanced by requiring a mature minor to involve her parents in all circumstances. Given that the vast majority of adolescent pregnancies and abortions occur among 16-17 year olds, *supra*, at 4 & n.3, 5, and that many of them have attained intellectual and emotional maturity, *supra*, at 12, absolute enforcement of parental notification would impose significant burdens on a large class of minors without promoting the State's interest in protecting immature minors.[57] Moreover, failure to provide an alternative to

[57] The magnitude of this case is illustrated by the actual experience in Minnesota where approximately half of the minors seeking abortions under the parental notification statute chose to utilize the by-pass procedure and of that group (almost all age 16 or older), only a handful were determined both to be immature and not to be better served by having an abortion. Hodg. Cert. App. 27a (findings of the district court).

parental notification would impose an "exceptional[] burden[]" on those immature minors whose best interests would be served by having an abortion without involving their parents. *Bellotti II*, 443 U.S. at 642.

This Court has previously held that a constitutionally adequate by-pass must assure the minor's confidentiality; it must be swift; and it must entail an examination into the individual pregnant minor's maturity and, if she is found not to be mature, into her best interests. *Bellotti II*, 443 U.S. at 643-44. See also *Ashcroft*, 462 U.S. at 490-93 and *Akron I*, 462 U.S. at 438-40. There is no reason that a by-pass procedure for a parental notification requirement should differ from the sound dictates of *Bellotti II*: the burden imposed by breaching a minor's confidentiality is substantially identical whether the State requires parental notification or parental consent; the burden of delay in the two cases is exactly the same; and the State's interest in protecting the minor from the consequences of immature or unwise decisions does not vary depending on the means the State has chosen to encourage parental involvement. Moreover, as acknowledged by this Court (*Bellotti II*, 443 U.S. at 644 n.23) and amply demonstrated by health care professionals, minors differ substantially in their maturity and in what would advance their best wishes, and thus an individualized by-pass assessment is absolutely essential to achieve narrowly the State's purposes if parental notice is required.

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit should be affirmed, and the decision of the Eighth Circuit should be affirmed to the extent that it holds that an effective by-pass procedure must be provided if the State is permitted to require parental notification.

Respectfully submitted,

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APPENDIX

CONFIDENTIALITY IN ADOLESCENT HEALTH CARE

POLICY STATEMENT (1988)

This statement was approved as policy by the following organizations: the American Academy of Family Physicians; the American Academy of Pediatrics; the American College of Obstetricians and Gynecologists; the Nurses' Association of the American College of Obstetricians and Gynecologists; and the National Medical Association.

Adolescents tend to underutilize existing health care resources. The issue of confidentiality has been identified, by both providers and young people themselves, as a significant access barrier to health care.

Adolescents in the United States, while generally considered healthy, have a range of problems, including some of such severity as to jeopardize their development and health, their future opportunities and even their lives. To illustrate, there is an urgent need to reduce the incidence of adolescent suicide, substance abuse, and sexually transmitted diseases and unintended pregnancy.

As the primary providers of health care to adolescents, we urge the following principles for the guidance of our professional members and for broad consideration in the development of public policy:

1. Health professionals have an ethical obligation to provide the best possible care and counseling to respond to the needs of their adolescent patients.

2. This obligation includes every reasonable effort to encourage the adolescent to involve parents, whose support can, in many circumstances, increase the potential for dealing with the adolescent's problems on a continuing basis.

3. Parents are frequently in a patient relationship with the same providers as their children or have been exercising decision-making responsibility for their children with these providers. At the time providers establish an independent relationship with adolescents as patients, the providers should make this new relationship clear to parents and adolescents with regard to the following elements:

- The adolescent will have an opportunity for examination and counseling apart from parents, and the same confidentiality will be preserved between the adolescent patient and the provider as between the parent/adult and the provider.

- The adolescent must understand under what circumstances (e.g., life-threatening emergency), the provider will abrogate this confidentiality.

- Parents should be encouraged to work out means to facilitate communication regarding appointments, payment, or other matters consistent with the understanding reached about confidentiality and parental support in this transitional period when the adolescent is moving toward self-responsibility for health care.

4. Providers, parents, and adolescents need to be aware of the nature and effect of laws and regulations in their jurisdictions that introduce further constraints on these relationships. Some of these laws and regulations are unduly restrictive and in need of revision as a matter of public policy. Ultimately, the health risks to the adolescents are so impelling that legal barriers and deference to parental involvement should not stand in the way of needed health care.